



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

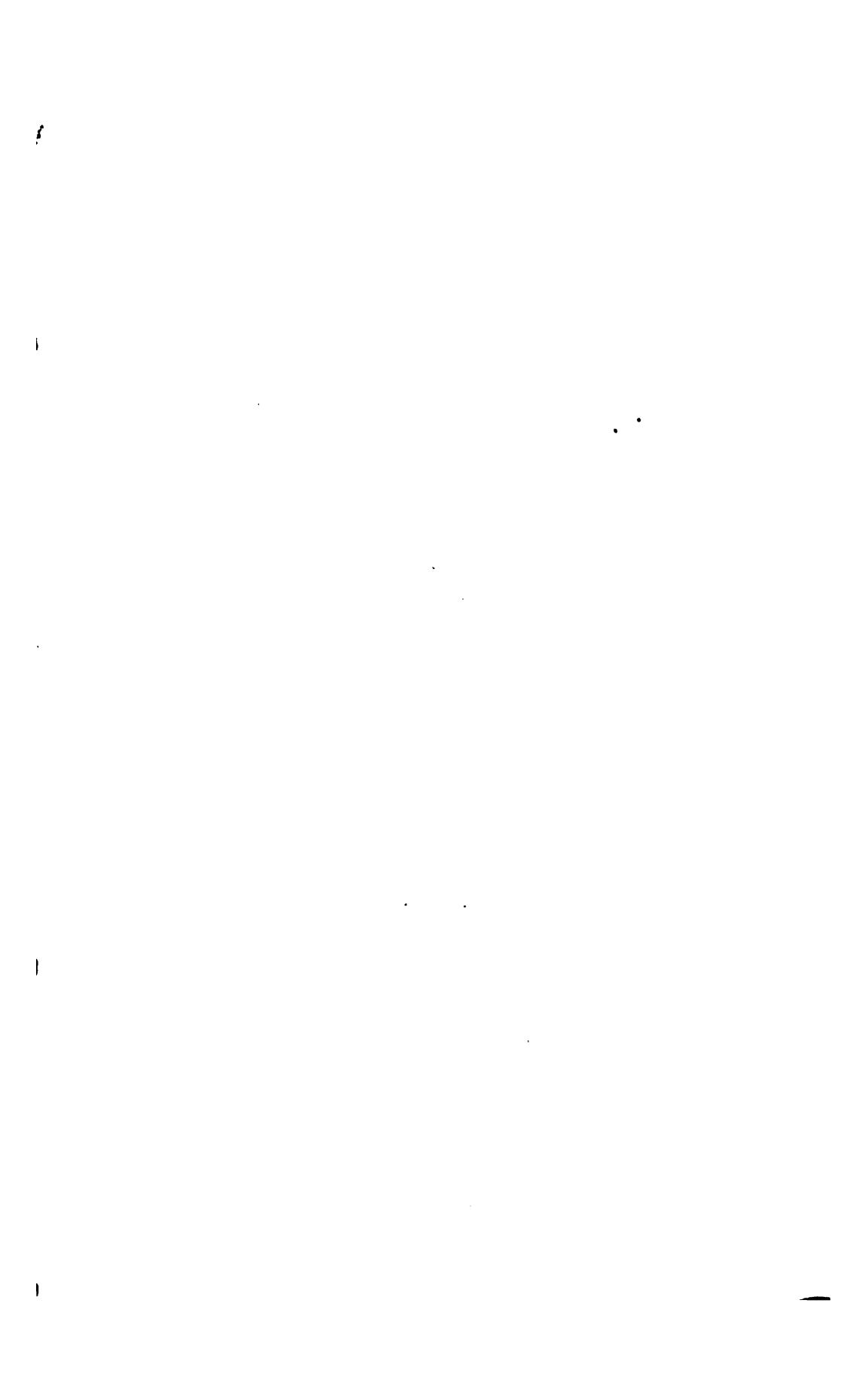
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

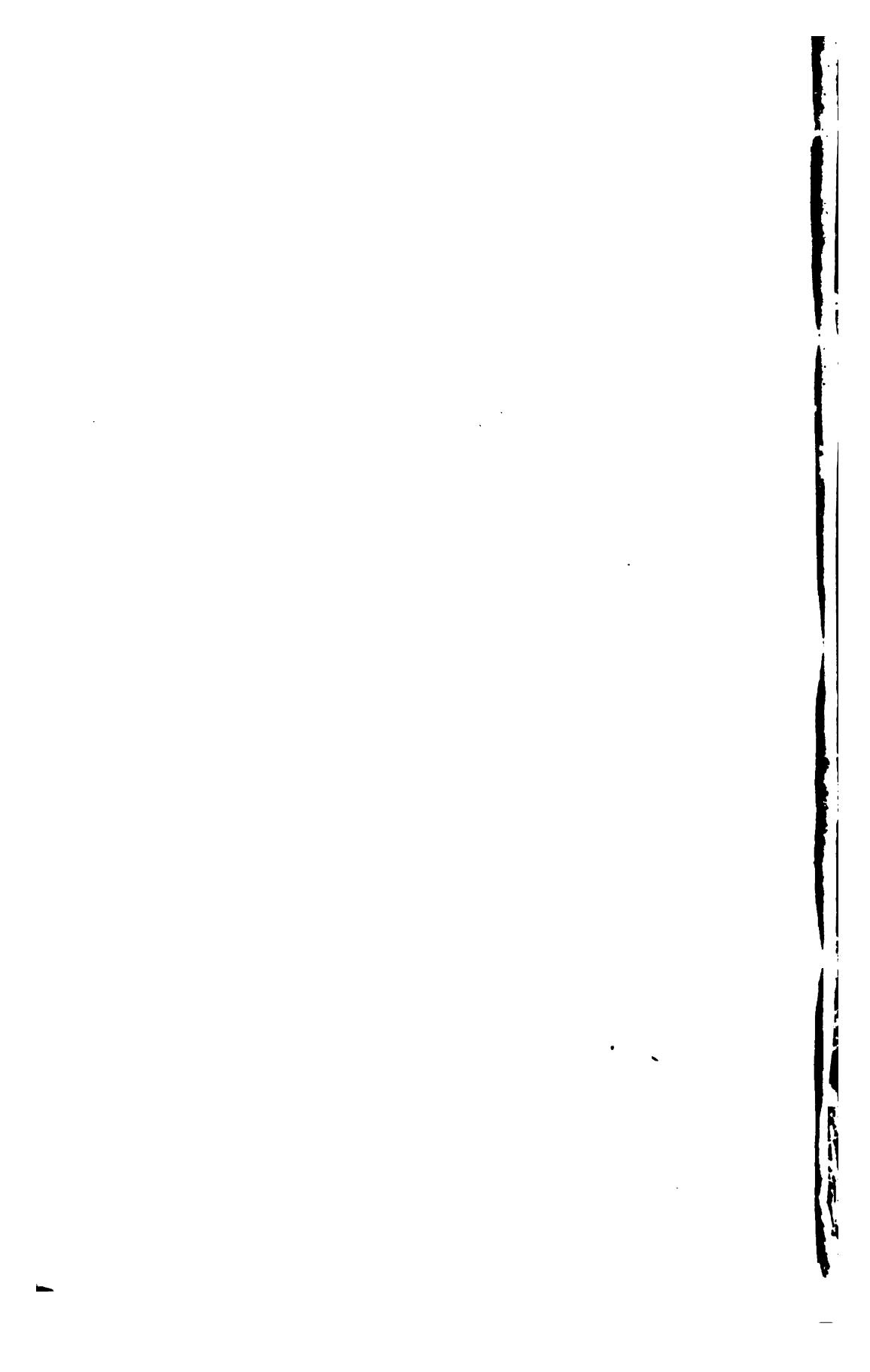
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**HARVARD LAW SCHOOL
LIBRARY**





P 21

REPORTS

34
o

OR

CASES IN LAW AND EQUITY

IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW-YORK.

BY OLIVER L. BARBOUR,
COUNSELLOR AT LAW.



VOL. VII.

ALBANY:
GOULD, BANKS & GOULD, 475 BROADWAY.

NEW-YORK:
BANKS, GOULD & CO., 144 NASSAU-STREET.

1851.

Entered according to act of Congress, in the year one thousand eight hundred and fifty-one,
By GOULD, BANKS & GOULD,

in the clerk's office of the district court of the northern district of New-York.

Rec. July 3, 1857

G. H. DAVIDSON, STEREOTYPER AND PRINTER,
SARATOGA SPRINGS.

JUSTICES OF THE SUPREME COURT.

FIRST JUDICIAL DISTRICT.

Class 1. ELISHA P. HURLBUT.*
2. JOHN W. EDMONDS, Presiding Justice.
3. HENRY P. EDWARDS.
4. WILLIAM MITCHELL.

SECOND JUDICIAL DISTRICT.

1. SELAH B. STRONG.†
2. WILLIAM T. McCOUN, Presiding Justice.
3. NATHAN B. MORSE.
4. SEWARD BARCULO.
JOHN W. BROWN.

THIRD JUDICIAL DISTRICT.

1. IRA HARRIS.*
2. MALBONE WATSON, Presiding Justice.
3. AMASA J. PARKER.
4. WILLIAM B. WRIGHT.‡

FOURTH JUDICIAL DISTRICT.

1. DANIEL CADY.† ‡
2. ALONZO C. PAIGE, Presiding Justice.
3. JOHN WILLARD.
4. AUGUSTUS C. HAND.

FIFTH JUDICIAL DISTRICT.

1. DANIEL PRATT.*
2. PHILO GRIDLEY, Presiding Justice.
3. WILLIAM F. ALLEN.
4. FREDERICK W. HUBBARD.

JUSTICES OF THE SUPREME COURT.

SIXTH JUDICIAL DISTRICT.

CLASS 1. WILLIAM H. SHANKLAND.† †
2. HIRAM GRAY, Presiding Justice.
3. CHARLES MASON
4. EBEN B. MOREHOUSE.
LEVINUS MONSON.

SEVENTH JUDICIAL DISTRICT.

1. THOMAS A. JOHNSON.‡
2. JOHN MAYNARD.*
HENRY W. TAYLOR.*
3. HENRY WELLES, Presiding Justice.
4. SAMUEL L. SELDEN.

EIGHTH JUDICIAL DISTRICT.

1. JAMES G. HOYT.‡ ‡
2. JAMES MULLETT, Presiding Justice.
3. SETH E. SILL.
4. RICHARD P. MARVIN.

* Judges of the Court of Appeals during the year 1850.

† Judges of the Court of Appeals during the year 1849.

‡ Re-elected in November, 1849.

MEMORANDUM.

The Hon. EBEN B. MOREHOUSE, Judge of the sixth judicial district, died on the 16th day of December, 1849, and the Hon. LEVINUS MONSON was appointed, in January, 1850, to fill the vacancy occasioned by his death.

The Hon. JOHN MAYNARD, Judge of the seventh judicial district, died in February, 1850, while a member of the Court of Appeals, and the Hon. HENRY W. TAYLOR was, soon afterwards, appointed to fill the vacancy occasioned by his death.

C A S E S

REPORTED IN THIS VOLUME.

A

Ackert v. Pultz,.....	386
Allen v. Way,.....	585
Angell, Martin v.....	407
Austin, Mallory v.....	626
Avery, Morgan v.....	656

B

Baird, Clark v.....	64
Baker v. Hoag,.....	113
Balcom v. Woodruff,.....	13
Bander v. Bander,.....	560
Bank of Vergennes v. Cameron,.....	143
Benton, People v.....	208
Bingham, Ehle v.....	494
Bliss v. Sheldon,.....	152
Boyce v. Brown,.....	80
Bronson v. Gleason,.....	472
Brown, Boyce v.....	80
Bryant, Decker v.....	182
Burhans v. Van Zandt,.....	91
Butler, Rundell v.....	260

C

Cadwell v. Colgate,.....	253
Cameron, Bank of Vergennes v.....	143
Carpenter, matter of,.....	30
_____, Kirby v.....	373
Chapman v. Fuller,.....	70
Childs v. Hart,.....	370
Clapp, Russell v.....	482
Clark v. Baird,.....	64
_____, Crandall v.....	169
_____, Rayner v.....	581

Clinton and Essex Mutual Ins. Co.,	
Tillou v.....	564
Colgate, Cadwell v.....	253
Converse v. Kellogg,.....	590
Cottrell, Van Rensselaer v.....	127
Crandall v. Clark,.....	169
Crane, Croswell v.....	191
Croswell v. Crane,.....	191
Culver v. Haslam,.....	314

D

Decker v. Bryant,.....	189
Diesendorff v. Gage,.....	18
Dolittle v. Eddy,.....	74
Drake v. Hudson River Railroad Company,.....	508
Drake v. Price,.....	388
Dyckman v. Mayor, &c. of New York,.....	498

E

Eaton v. North,.....	631
Eddy, Dolittle v.....	74
Ehle v. Bingham,.....	494
Evarts v. Palmer,.....	178

F

Fisk v. Wilber,.....	396
Fleming v. Hollenback,.....	271
Foreman v. Foreman,.....	915
French v. Kennedy,.....	452
Fuller, Chapman v.....	70

CASES REPORTED.

G

Gage, Diefendorff v.	18
Gleason, Bronson v.	479
Goldamid v. Lewis County Bank.	427
Goings, Green v.	652
Graves, Small v.	576
Green v. Goings,	652
Griffin v. Martin,	297

H

Hamilton and Deansville Plank Road Co. v. Rice,	157
Hart, Childs v.	370
Haslam, Culver v.	314
Helmer, Smith v.	416
Hesketh v. Stevens,	488
Hinman, Pennell v.	644
Hoag, Baker v.	113
Hollenback, Fleming v.	271
Horr, People v.	9
Hoyt, Lathrop v.	59
Hudson River Railroad Company, Drake v.	508
Hull v. Peters	331

J

Johnson, Manning v.	457
---------------------	-----

K

Kellogg, Converse v.	590
Kelsey, Leach v.	466
Kennedy, French v.	452
Keyser v. Waterbury,	650
King v. Wilcomb,	263
Kingston Mutual Ins. Co., Tillou v.	570
Kirby v. Carpenter,	373

L

Larue v. Rowland,	107
Lathrop v. Hoyt,	59
Leach v. Kelsey,	466
Le Couteulx v. The Supervisors of Erie Co.,	249
Leitch, Muir v.	341
Lewis County Bank, Goldamid v.	427
Low, White v.	204
Lynch, Welch v.	380

M

McCullough, Moss v.	279
McGiven v. Wheelock,	23
McGrath, Scott v.	53
Mallory v. Austin,	626
Manning v. Johnson,	457

March v. The People,	391
Martin v. Angell,	407
_____, Griffin v.	297
Marvin, Houghtaling v.	412
Matter of Carpenter,	30
Mayor, &c. of New-York, Dyckman v.	498
Mayor, &c. of New-York v. Whitney,	485
Mesick v. Mesick,	190
Milks, Rice v.	337
Miller, Stone v.	368
Morgan v. Avery,	656
Moss v. McCullough,	279
Muir v. Leitch,	341

N

North, Eaton v.	631
Norton, The People v.	477

O

Oswego and Syracuse Railroad Co., Parmelee v.	599
Ott v. Schroepel,	431

P

Palmer, Evarts v.	178
Parmelee v. The Oswego and Syracuse Railroad Co.,	599
Pennell v. Hinman,	614
People v. Norton,	477
_____, V. Powers,	462
_____, March v.	391
_____, v. Benton,	208
_____, v. Horr,	9
Pomeroy, White v.	640
Powers, People v.	462
Price, Drake v.	388
Pultz, Ackert v.	386

R

Randall, Wilcox v.	633
Rayner v. Clark,	581
Rice, Hamilton and Deansville Plank Road Co. v.	157
Rice v. Milks,	337
Rose v. Rose,	174
Rowland, Larue v.	107
Rundell v. Butler,	260
Russell v. Clapp,	482

S

Safford, Williams v.	309
Schroepel, Ott v.	431
Scott v. McGrath,	53

CASES REPORTED.

vii

Sheldon, Bliss v.....	152	Van Rensselaer v. Cottrell,.....	127
____ v. Wright,.....	39	____ v. Witbeck,.....	133
Small v. Graves,.....	576	Van Zandt, Burhans v.....	91
Smith v. Helmer,.....	416		
Stevens, Hesketh v.....	488		
Stone v. Miller,.....	368		
Supervisors of Erie County, Le Conteaux v.....	245		
Swarthout v. Swarthout,.....	354		

T

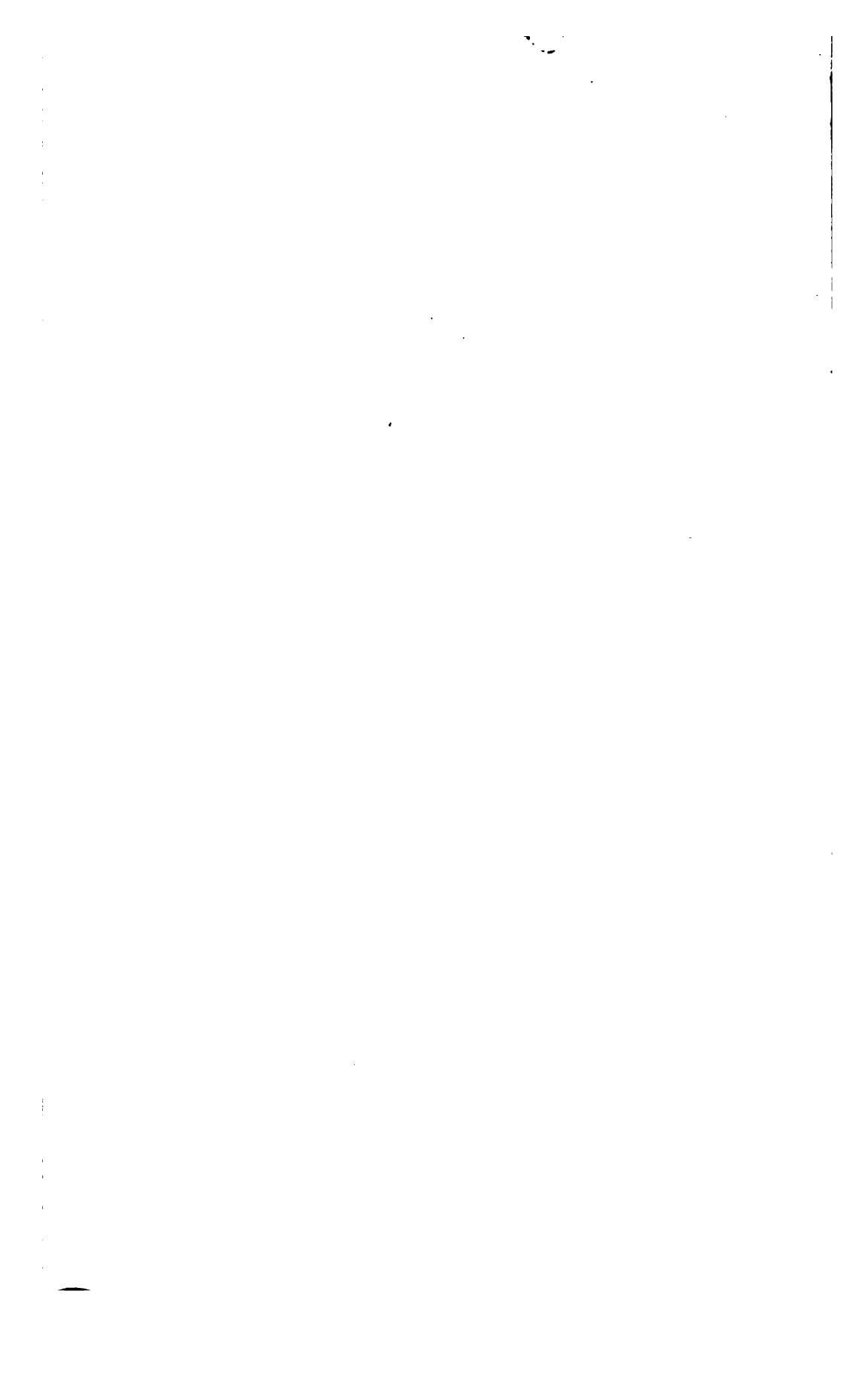
Thomas, Wadsworth v.....	445
Tillou v. The Clinton and Essex Mutual Ins. Co.....	564
Tillou v. The Kingston Mutual Ins. Co.....	570

V

Vail v. Vail,.....	226
Vanderwerker v. Vanderwerker,..	221

W

Wadsworth v. Thomas,.....	445
Waterbury, Keyser v.....	650
Way, Allen v.....	585
Welch v. Lynch,.....	380
Wheelock, McGiven v.....	23
White v. Low,.....	204
____ v. Pomeroy,.....	640
Whitney, Mayor, &c. of N. York v.	485
Wilber, Fisk v.....	395
Wilcomb, King v.....	263
Wilcox v. Randall,.....	633
Williams v. Safford,.....	309
Witbeck, Van Rensselaer v.....	133
Woodruff, Balcom v.....	13
Wright, Sheldon v.....	39



CASES
v
Law and Equity
IN THE
S U P R E M E C O U R T
OF THE
S T A T E O F N E W-Y O R K .

JEFFERSON GENERAL TERM, July, 1849. *Pratt, Gridley, and Allen, Justices.*

THE PEOPLE *vs.* HORR.

Under an indictment for maliciously cutting and girdling certain fruit trees, described in the indictment as the property of one B., it is sufficient proof of the ownership of the property to show that the premises on which the trees stood were in the possession and occupation of B. at the time of committing the offence.

And evidence that B. was not the sole owner of the premises in question, but was only one of several joint owners who held the legal title in common, will not amount to a variance between the indictment and the proof.

MOTION for a new trial. This was an indictment for feloniously and maliciously girdling and damaging and destroying fruit trees, and was tried at the Jefferson county oyer and terminer in February, 1849, before Justice MASON. The indictment charged the offense to have been committed by the prisoner on

The People *v.* Horr.

the 5th day of December, 1848, at Lorraine, in the county of Jefferson, by the girdling and otherwise injuring thirteen apple trees, the property of one Walter R. Brown, then and there growing, &c. After considerable testimony had been given by the district attorney in support of the indictment, and after it had been proved that the complainant Walter R. Brown was at the time the injury was done to the trees, and for sometime before had been, in possession of the premises on which the trees were growing; as it appeared that Brown was not the sole owner of the property, it was insisted by the counsel for the prisoner that in order to sustain the indictment it must be shown that Brown was the owner of the property injured, at the time the trespass was committed. It was also insisted by him that Brown had only an undivided interest in said property at that time. It was admitted by the district attorney that Brown was the owner of an undivided interest in said property, only in common with several other persons, and was not the sole owner thereof. The counsel for the prisoner thereupon insisted that the indictment could not be sustained, for the reason that there was a variance between the indictment and the evidence. That the indictment did not alledge that Brown and the other persons were the owners of said property; and that it was not sufficient to alledge the ownership of the property to be in Brown only; and he requested the court so to decide. The court overruled the objection, and decided that it was sufficient to alledge in the indictment that Brown was the owner of the property; although from the evidence before the court it appeared that Brown was the owner of only an undivided interest therein; without saying any thing about the other owners; and that there was no variance between the indictment and the evidence. To which opinion and decision of the court the counsel for the prisoner excepted, and upon a bill of exceptions moved for a new trial.

J. Moore, Jun. (district attorney,) for the people.

T. C. Chittenden, for the prisoner.

The People *v.* Horr.

By the Court, GRIDLEY, J. This case comes before the court upon a bill of exceptions taken by the prisoner on the trial of an indictment against him for "maliciously cutting and girdling certain *fruit trees*," described as the property of one Walter R. Brown. The counsel for the people proved the commission of the trespass, and that the premises on which the fruit trees grew, was, when the act of trespass was committed, and for sometime previous had been, in the possession of the said Brown. It appeared, however, in a subsequent stage of the trial, that Brown was not the sole owner of the premises in question, being one of several joint owners, who held the legal title in common. On this ground the counsel for the prisoner insisted that there was a fatal variance between the description of the ownership of the property as laid in the indictment and that established by the proof. And this is the question presented for our decision.

It is a general principle, that possession is evidence of ownership, both of real and personal property; and is conclusive evidence against a wrong-doer. (*Cowen & Hill's Notes*, 358.) "And the same principle applies to criminal as well as civil cases." And Mr. Phillips (1 *Phil. Ev.* 118, 119) gives many cases in illustration of this rule. It is not denied that the prosecutor must prove the title to the property described in the indictment as he has laid it; and he does so when he gives evidence of possession. That alone is evidence of a special or qualified property, which is sufficient to uphold an averment of ownership, in a civil or a criminal case. In a civil action, when the direct issue is on the title, and the question is which party has the better title, the defendant may rebut the *prima facie* evidence arising from possession, and show a superior right in himself. Not so in the case of a wrong-doer. Brown, being in possession, might have maintained trespass against the prisoner for the very act of which he has been convicted, and the prisoner could not have defeated such an action by showing that the plaintiff had a legal title only to an undivided interest in the premises.

Such has been the invariable rule of evidence applied in in-

The People *v.* Horr.

dictments for larceny, arson, and burglary. (See *Stark. Ev. Pt. 4*, pp. 829, 830; *Id. 65*, 326, 327.) Indeed, when the offense, as in this case, is committed against the possession, the ownership *must be laid* in him who *occupies suo jure*. (See *4 Stark. 326*, 7, 8; *Rex v. Jones, Leach*, 607; *Id. 478*; *Arch. 254* to 258.) In *The People v. Gates*, (15 *Wend.* 159,) it was held that the indictment must, in a case of arson in the second degree, charge the house to be the property of the tenant, and not of the party who held the legal title, and a conviction was set aside in that case because the property was laid in the general owner. (See also *2 John. 105*.) The counsel for the prisoner contends that the case of arson stands on peculiar grounds, because the statute has provided, in defining the offense of arson in the first degree, (*2 R. S. 547*, § 9,) "that any house, prison, jail, or other edifice which shall have been usually occupied by persons lodging therein at night shall be deemed a dwelling house of any persons so lodging therein." This clause, however, has no bearing on the question under consideration. The object of the legislature was to enact what had already been declared to be the law in *2d John. 105*, where it was expressly held that on an indictment for burning the dwelling house of another, it was sufficient if it were in fact the dwelling house of the party, though he was not the owner of the building. In that case the building was a jail, and it was described as the dwelling house of the jailer; and the court said they would not inquire into the tenure or interest which the occupant had in the house burnt. There is nothing in the language of the statutes which create and define the crimes of arson, burglary, and the offence of which the prisoner has been convicted, which requires a different rule to be applied to the description of the ownership of the property in the one case from that in the others. (See *2 R. S. 577*, § 15; *Id. 547*, 555; *Id. 556*.) Nor is there any difference *in this respect*, between the offense of cutting and girdling trees under our act, and the acts of parliament on the same subject. (See *Arch. Cr. Pl. 284*, 285, 286.) Mr. Archbold, in giving directions as to the evidence necessary to be produced, to maintain the several allegations in the indict-

Balcom *v.* Woodruff.

ment for "*cutting, breaking, and barking trees, &c.*" says: "Prove that the defendant cut the trees mentioned in the indictment, or some of them, that the trees were the property of J. N., that is, that they were growing on land belonging to him, OR IN HIS OCCUPATION."

There are cases in which the indictment must state the legal title accurately, as where there is no actual occupation of the premises. In such a case, the indictment must charge the trees to be the property of all of the owners, if there be several. It was doubtless to provide for such a case, among others, that the act of 7th Geo. 4, ch. 64, § 14, upon the absence of which from our statute book the prisoner's counsel insisted so strenuously, was passed. I have not access to that act, but its aid is certainly not required to render the evidence of possession in Brown due proof of his ownership of the trees which were cut by the prisoner under the charge in the indictment.

The motion for a new trial must be denied.

SAME TERM. *Before the same Justices.*

BALCOM *vs.* H. W. & N. M. WOODRUFF.

A note made by two persons, and signed by one of them as "surety," is inadmissible in evidence under the common counts, in an action brought against both makers.

A promissory note is only *prima facie* evidence of money lent, or had and received, by the party sought to be charged; and therefore where it is apparent from the face of the note that no money was in fact received by such party, the note will not sustain the common counts.

The word "surety" appended to the name of one of the makers of a note is not inconsistent with the idea that money was received by the other makers; but it does repel all presumption that the *surety* received it. And therefore, as against *him*, the note furnishes no evidence of money either lent to, or received by, the party, so as to support the common counts.

The general rule is that a party who has not applied for an amendment until after he has been nonsuited, is too late to ask for a new trial, in addition to an

Balcom v. Woodruff.

amendment. But where a plaintiff had been nonsuited at the circuit, on the ground that his declaration contained no count adapted to the nature of the case, it appearing that the defendant had not been misled; that the cause had been once tried without any objection having been made; that the statute of limitations had attached; and that such relief would be manifestly in furtherance of justice, the court allowed the plaintiff to amend his declaration *nunc pro tunc*, and set aside the nonsuit, on the payment of costs.

THIS was an action of assumpsit, originally commenced in the court of common pleas of Jefferson county. The declaration was in the usual form, containing the common money counts, alledging a joint indebtedness of the defendants; to which was attached a copy of a note in these words:

“Watertown, 13th May, 1840.

Eighteen months from date, for value received we promise to pay P. C. Moulton or bearer, at our store, two hundred dollars and interest.

H. W. WOODRUFF.

\$200.

N. M. WOODRUFF, Surety.”

(Endorsed) “Rec'd, 27 Nov. 1841, twenty-one dollars.”

With a notice that such note would be given in evidence under said declaration, and was the only claim upon which the suit was commenced. The defendants interposed a plea of the general issue, accompanied by a notice of special matter. The cause was tried at the Jefferson circuit in December, 1848, before Justice ALLEN. On the trial the plaintiff proved the execution of the note, and offered the same in evidence. The defendants' counsel objected to said note being received and read in evidence, on the ground that it appeared on the face of the note that N. M. Woodruff signed it as surety, and therefore it could not be given in evidence under the plaintiff's declaration, inasmuch as that contained only the common money counts, which objection was sustained by the court, and the note excluded; to which decision the plaintiff's counsel excepted. The plaintiff's counsel then insisted upon his right to read the note in evidence and take judgment against the defendant H. W. Woodruff alone; to which the defendants' counsel objected, and the court sustained the objection; deciding that the declaration being against the defendants jointly, a joint liability or contract must be proved; that a recovery could not be had

Balcom v. Woodruff

against one of the defendants only ; to which decision the plaintiff's counsel excepted. There being no further evidence offered, the court directed a nonsuit to be entered, which was accordingly done ; and the plaintiff moved for a new trial. He also moved for leave to amend his declaration.

B. Bagley, for the plaintiff.

J. Mullin, for the defendants.

By the Court, GRIDLEY, J. In this case the plaintiff was nonsuited on the trial, upon the ground that a note which constituted his only cause of action, and was signed by one of the defendants as "*surety*," was inadmissible under the common money counts. It is not denied that the case of *Butler v. Rawson*, (1 *Denio*, 105,) is directly in point to sustain the nonsuit ; but it is said that the decision in that case has not been satisfactory to the profession, and we are asked to review it. We have heretofore had occasion to say that we disapprove of the practice of overruling a previous decision upon the very point in question simply because we happen to think differently from our predecessors. Our views upon this subject are fully expressed in the case of *The People v. Tredway*, (3 *Barb. Sup. Court Rep.* 474,) and we will not repeat them here. But we do not think that the doubts expressed concerning the decision in *Butler v. Rawson* are well founded. The decision is placed upon the principle that a promissory note is only *prima facie* evidence of money lent, or had and received, by the party sought to be charged ; and therefore, where it is apparent from the face of the note, that no money was in fact received by such party, the note will not sustain the common count. This principle can not be successfully assailed. A note is held to be admissible under the money counts, for the reason that the words "*value received*," when either expressed or implied in a promissory note, are *prima facie* or *presumptive* evidence that such value was received in money. This, however, was *presumptive* evidence *only*, and could not prevail, when the presumption was

Balcom v. Woodruff.

repelled by the language of the instrument itself. The word "*surety*" appended to the name of one of the makers of a note, is not inconsistent with the idea that money was received by the other makers; but it does repel all presumption that the *surety* received it, and therefore, as against *him*, the note furnishes no evidence of money, either lent to or received by the party, so as to support the common counts.

The doubts referred to have arisen from an admission by the judge who delivered the opinion in *Butler v. Rawson*, that a note which contained nothing on its face to repel the presumption that it was given for money, when once given in evidence, becomes *conclusive evidence* of a money consideration, not subject to be defeated by proof that it was given for *land* or *work*, or any other than a pecuniary consideration. This concession was unfortunate; for the case of *Wells v. Girling*, (8 *Taunt.* 737,) cited by the judge to uphold the distinction between this class of cases and those in which the presumption is repelled by words on the face of the note itself, turns out, on examination, to be a case in which the *fact* of suretship did not appear on the face of the note, but was established by independent proof. In truth the note is only *prima facie* evidence of a *consideration at all*. It would therefore be surprising that it should ever have been held to be *conclusive* evidence, not only of a consideration, but that such consideration consisted of money lent to the defendant, or had and received by him for the plaintiff's use. That a note is only *prima facie* evidence, under the money counts, see *Chit. on Bills, Springf. ed. of 1839*, 595, 6; *cases cited by Sutherland, J. in 8 Cowen*, 83; 7 *Wheat.* 35. There are but two cases opposed to this unbroken series of authorities. In *Smith v. Van Loan*, (16 *Wend.* 659,) it was held that it was not competent to show that a note was given for work and labor instead of money, in order to defeat a recovery under the common counts. This decision rests solely on the authority of *Hughes v. Wheeler*, (8 *Cowen*, 77;) and the decision of a majority of the court in that case upholds the citation. But it is a remarkable fact that the only reported opinion in that case presents a very able argument of Judge Sutherland, maintaining the exact opposite of

Balcom v. Woodruff.

the principle stated in the marginal note, and adopted by his brethren. After saying that a promissory note is *prima facie* evidence of money had and received by the maker for the use of the payee, the judge proceeds in this language: "But neither in England nor in this state has it ever been held that a note was *conclusive evidence* of the receipt of the plaintiff's money, but I think a contrary rule is deducible from the authorities. On this ground alone I think the judgment should be reversed." Equally clear is the language of the court in the case of *Paige's Adm'r's v. The Bank of Alexandria*, (7 Wheat. 35.) "Although a note or an indorsement be *prima facie* evidence of a receipt of money from the holders by the maker or indorser, yet when *all the other testimony* in the case, produced by the plaintiffs themselves, shows unequivocally that the money for which the note was made, was paid, not to the indorser but to the maker himself, for his sole use, the presumption arising from the mere act of indorsement is destroyed, and the party in such case ought not to be permitted to abandon his count on the written contract of the party and apply it to the general money counts." We think therefore that the nonsuit was rightly granted, and we have no power to set it aside on the ground of an erroneous decision of the judge at the circuit.

The next question is whether we can allow an amendment, upon the motion made for that purpose. It is manifestly in furtherance of justice to do so. The objection is technical; and had the motion to amend been made on the trial, it would probably have been granted under section 169 of the code; for it can hardly be supposed that the defendant had been misled. We can now allow an amendment under section 173; but an amendment alone, unless it be an amendment to take effect "*nunc pro tunc*," will not aid the plaintiff. To be of any avail to him he must have a new trial, in which respect the case differs from the cases cited on the argument. (See 6 *Hill*, 377; 6 *Wend.* 506; 7 *John.* 468.) There is, however, one case where an amendment was allowed on payment of costs, and a new trial granted, in a case situated like the one under consideration. This was done in *Holmes v. Seely*, (17 *Wend.* 75;) and

Deifendorff *vs.* Gage.

although the action was ejectment, the statutory provisions relating to that class of actions is not made the ground of the decision. In this case we may give the plaintiff the benefit of a presumption that he was taken by *surprise*, inasmuch as the case had been once tried without any such objection having been taken. On the whole, as it is shown that the statute of limitations has run against the demand, we allow the plaintiff to amend his declaration *nunc pro tunc*, setting aside the non-suit, on the payment of the costs of the trial and those which have accrued subsequently. This relief, however, is granted under the peculiar circumstances of this case, and the case is not to be made a precedent. The general rule is that a party who has not applied for an amendment until he has been nonsuited, is too late to ask for a new trial, in addition to an amendment.

SAME TERM. *Before the same Justices.*

DEIFENDORFF *vs.* GAGE.

Where property is sold at a stipulated price, without any fraud or warranty on the part of the vendor, and after an examination of it by the purchaser, with all the means of knowing its condition and quality which the vendor possesses, the fact that the property is good for nothing, and that no use can be made of it, forms no defense to an action for the price.

Under an averment in an answer, that the property was "very poor, and of very little value," the defendant can not prove that it was "worth nothing and of no value."

A defendant will not be allowed to give evidence of a defense not set up in his answer.

In the absence of any proof as to the value of an article at the place where it was agreed to be delivered, evidence of its value at a different place, in the immediate neighborhood, is admissible.

Deifendorff *v.* Gage.

APPEAL, by the defendant, from the county court of Herkimer county. The suit was originally commenced before a justice of the peace. The complaint alledged that in April, 1848, the defendant, Gage, called upon the plaintiff, Deifendorff, to purchase some hay; and that after viewing and examining the plaintiff's hay, and knowing the quality and condition thereof, he bought a quantity of it then lying in a bay in the plaintiff's barn, and also so much other hay as the plaintiff might have to spare after foddering, that spring, to be delivered to the defendant at Fink's basin, for the sum of \$10 per ton; that the plaintiff, within a few days thereafter, delivered to the defendant, at Fink's basin, a part of the hay in the barn, which the defendant accepted. And that in June or July the plaintiff tendered the hay that he had to spare after foddering, being about 13 tons; which the defendant refused to accept. That the plaintiff was forced to resell the hay, at a loss of \$2 per ton, besides costs and charges. And the plaintiff claimed judgment for \$33,34, with interest from April 26, 1848, and for \$26, with interest from the 13th of June, 1848. The defendant, in his answer, denied the allegations in the complaint. In the 8th averment of his answer, he alledged that the hay which the plaintiff delivered to him "was very poor, and of very little value," and was not of a marketable quality. To this allegation the plaintiff replied that when the defendant bought the hay, he saw the same, and examined it, and might have seen and known, and did see and know, the quality and condition thereof; and the plaintiff denied any knowledge that such hay was poor hay and not merchantable in quality at the time of the sale thereof. On the trial the plaintiff proved the contract for the purchase of the hay and the delivery of four loads to the defendant. He also proved that in June, 1848, the market price of hay at Little Falls, within three miles of Fink's basin, was \$8 per ton. The defendant offered to prove, by Nelson J. Davis, that the hay was good for nothing, and that no use could be made of it, whatever. Also that in a conversation between the parties, the defendant told the plaintiff that he sold him the hay for good hay, and that it was good for nothing, and the plaintiff said he

Deifendorff *v.* Gage.

sold it to him for good, and it *was* good hay. The plaintiff objected to the evidence, and the court sustained the objection, and excluded the evidence. The jury rendered a verdict in favor of the plaintiff for \$32,75, and judgment was entered for that sum, by the justice, with \$5 costs; and the county court affirmed the judgment.

F. Kieran, for the appellant.

J. Mullin, for the respondent.

By the Court, GRIDLEY, J. The appellant seeks to reverse the judgment of the county court and of the justice, in this cause, for the error of the justice in admitting and rejecting evidence upon the trial.

I. The defendant offered to prove, by one Nelson J. Davis, that the hay, for which the suit was brought, was *good for nothing*, and that *no use* could be made of it, and that when it was delivered the defendant was absent from home and did not see it. (1.) The hay had been purchased at \$10 per ton, (to be delivered at the place where it was actually delivered,) without any fraud on the part of the plaintiff, and after an examination of it by the defendant, with all the opportunity to know its condition and quality, possessed by the plaintiff. The facts offered in evidence, therefore, formed no defense to the action. (See 2 *Hill*, 606; 18 *Wend.* 449; 4 *Cowen*, 440; 2 *Kent's Com.* 484, 5.) (2.) The evidence was inadmissible, for the reason that no such fact was set up in the answer. The averment in the answer was that the hay was "*very poor*, and of *very little value*." There was no allegation that the hay was worth "*nothing*," and of "*no value*." If then, the evidence offered would be available as a defense, when proof that the hay was worth but little, and was *very poor*, would not, it is quite clear that the evidence was properly rejected for the want of a proper averment.

II. The defendant also offered to prove that when the parties were disputing about the hay, the plaintiff admitted that he sold

Deifendorff v. Gage.

the hay for good hay, and then to prove that the hay was *good for nothing*. The defendant's counsel argues that this was substantially an offer to show a warranty of the hay and a breach of such warranty. We think, however, the facts offered would not *necessarily* amount to a warranty ; but if they did, then the evidence was inadmissible, for the reason that no such defense was stated in the answer. To constitute a defense to the action, the defendant was bound to make out a case of fraud or of warranty, and neither was stated in the answer.

III. There was no error in receiving evidence of the price of hay at Little Falls, a distance of three miles from Fink's basin where the hay was to be delivered. That was in the immediate neighborhood, and the evidence therefore properly received. (8 *Wend.* 435.) This evidence was offered and received in relation to the claim for the difference in value between the hay which the defendant refused to receive and the stipulated price. The judgment could not have embraced any damages arising from that cause, and therefore the evidence, even if improperly received, forms no ground for the granting of a new trial. (12 *Wend.* 41. 2 *Hill*, 205.)

We are of the opinion, for these reasons, that no error was committed on the trial of the cause for which a new trial ought to be granted ; and we are satisfied that the defendant has suffered no injustice by the judgment.

Judgment affirmed.

SAME TERM. *Before the same Justices.*

McGIVEN vs. WHEELOCK and PENNIMAN.

W., one of two mortgagors, by an arrangement with P., the other, assumed the payment of the mortgage debt, and thereupon executed a new mortgage upon the same and other premises, to C. the holder of the original mortgage, which new mortgage was given to secure an individual debt of W. and also the balance due upon the joint mortgage. The joint mortgage was not extinguished, but was kept alive as a collateral security to the second mortgage. W. subsequently assigned his property to assignees, for the benefit of his creditors. The assignees advertised the mortgaged premises for sale, and sold it free from incumbrances, M. becoming a purchaser of a portion thereof. By an arrangement between M. and C. and the assignees, the sum due upon the second mortgage was then secured by M. to C., the owner thereof, which security C. received in payment of the new mortgage, and receipted the amount to the assignees. C. then assigned the original mortgage to M. On a bill by M. to foreclose the original mortgage,

Hold. 1. That the arrangement between M., C. and the assignees, for securing to C. the payment of the second mortgage, amounted to a *payment and satisfaction* of that mortgage.

2. That by the payment of the amount due upon the second mortgage, the original mortgage was substantially paid to C. and satisfied, and became *functus officio*; and that C. had no power to transfer it, as a subsisting security, so as to authorize M., the assignee, to file a bill to foreclose it.

Although equity will sometimes keep alive a mortgage which has been substantially satisfied, yet, whenever this is done, it is for the advancement of justice, and never to aid in the perpetration of a fraud through the forms of law. *Per* GRIDLEY, J.

IN EQUITY. The bill in this cause was filed to foreclose a mortgage executed by the defendants Wheelock and Penniman, on the 7th of February, 1834, to N. M. Woodruff, to secure the payment of \$567,72, with interest. The bill alledged an assignment of the mortgage from Woodruff to John Clarke, executed on the 31st of August, 1839, and an assignment from Clarke to the plaintiff, made on the 8th of March, 1847. The bill was taken as confessed by the defendant Wheelock. Penniman put in an answer, in which he alledged that after the making of the mortgage, and the bond accompanying the same, it was understood and agreed, for a valuable consideration, be-

McGiven v. Wheelock.

tween him and Wheelock, that the latter should assume, pay, and discharge the said bond and mortgage in his own behalf and at his own expense; and that in fulfilment of said agreement Wheelock did, on or about the 15th of April, 1843, whilst the said John Clarke held and owned said bond and mortgage, make, execute and deliver to him a mortgage for the sum of about \$1565, upon the same premises embraced in the first mortgage, together with other real estate; which mortgage included the amount of principal due upon the original bond and mortgage, whereby such original bond and mortgage were incorporated into and became a part and parcel of the said mortgage from Wheelock to Clarke. That on the 3d of April, 1846, Wheelock made and executed an assignment to L. Paddock and J. L. Goldsmid, of all his property, for the benefit of his creditors. That under and in pursuance of a power contained in that assignment, the assignees, on the 30th of January, 1847, sold and disposed of Wheelock's real estate, or his interest therein embraced in the original mortgage, and also in the mortgage to Clarke; they agreeing and undertaking with the bidders and purchasers, at the time of the sale, to take up and discharge both of said mortgages, so as to relieve the property from those incumbrances. That in pursuance of, and to fulfil, such understanding, the said assignees of Wheelock did, out of the avails of such sale, and of the property of Wheelock so assigned to them, on the 5th of March, 1847, pay to Clarke the amount due upon Wheelock's mortgage to him; and that Clarke, whilst he was yet the owner of, and held, the said bond and mortgage, received and accepted the said money in full payment and satisfaction of that mortgage; whereby, and by virtue of such payment, the defendant Penniman alledged that the mortgage sought to be foreclosed in this suit, became and was fully paid and satisfied; being incorporated as aforesaid in the said mortgage from Wheelock to Clarke, paid as aforesaid. A replication was filed, and proofs were taken, and on the 19th of June, 1848, the cause was referred to a referee to compute the amount due to the plaintiff upon the bond and mortgage, and also to take proofs upon the other matters, questions and

McGiven *v.* Wheelock.

issues raised by the pleadings, and to report the same to the court. The referee returned the proofs taken before him, and reported that he had computed and ascertained the amount due upon the bond and mortgage; and that if the court should adjudge that the plaintiff was entitled to the relief asked for in his bill, and that the amount of such mortgage, and interest, was still due and unpaid, as claimed in the bill of complaint, then he found there was due to the plaintiff, for principal and interest on the bond and mortgage, \$547,72. The cause was brought to a hearing upon the report of the referee, and the equities reserved.

John Clarke, for the plaintiff.

G. C. Sherman & F. W. Hubbard, for the defendant Penniman.

By the Court, GRIDLEY, J. We think that the bill in this cause should be dismissed, upon grounds which we will proceed to state with as much brevity as possible.

I. We are of the opinion that the inference may be justly drawn from the acts of Wheelock, and his agreement with Mr. Clarke, that as between him and Penniman, he had assumed to pay the debt which the mortgage in question was executed to secure.

(1.) The debt was, when contracted, due from the defendants jointly, and though payable in one year, was suffered to remain unpaid until the 15th of April, 1843. At that time Wheelock did in fact assume the satisfaction of the debt, upon himself, and on that day executed a bond and mortgage for \$1565 to Mr. Clarke, who was then the holder and owner of the mortgage in question, to secure an individual debt of Wheelock, and also the balance that remained due on the joint bond and mortgage of Penniman and Wheelock. Why did Wheelock do this, unless, by some arrangement with Penniman, he had assumed the joint debt? If he had paid it up in money, it would excite less surprise; but why should he mingle it with his own indi-

McGiven v. Wheelock.

vidual liabilities, and incumber his individual property to secure the payment at a future day, unless he had assumed it as his own? There is no evidence that Clarke was pressing for payment or further security, or that the premises were not an ample fund to secure the balance then due; or that Penniman was not then and since perfectly responsible. The *actual assumption* of this debt *as an individual liability*, and the giving of a new security for it by Wheelock, unexplained, certainly furnishes a very strong presumption that he thus assumed this debt because he had agreed with Penniman to do so.

(2.) The mortgage in question was not *extinguished*; for Mr. Clarke, as a prudent man, was unwilling to relinquish any security which he possessed. But it was kept *alive solely as a collateral security* for the amount of the balance then due upon it, to the same amount secured by the new \$1565 mortgage. The important point in this transaction is, that the new bond and mortgage became, by the agreement between Wheelock and Clarke, the *principal debt*, and the old bond and mortgage, that is, the joint obligation of Penniman and Wheelock, a *collateral security only*. In other words, the *individual obligation* of Wheelock was substituted as the *principal debt*, and the *joint obligation* of Penniman and Wheelock took the place of a *mere surety fund*. That I am right in the conclusion, that the joint mortgage was merely kept alive as a collateral security until the mortgage for \$1565 was paid, I refer to the statement of this fact contained in schedule A. annexed to Wheelock's general assignment; to the admissions in folio 8th, that Mr. Clarke drafted and witnessed the said assignment and schedule; and to the testimony of Mr. Clarke in folio 26 of the evidence, when he testifies unequivocally to the fact. Now, it is entirely clear, that the object sought, by including the debt secured by the old mortgage, in the new one, was not to *increase the security merely*, for that would have been effected by retaining the old joint mortgage as the *principal debt*, and making the new one collateral to it *pro tanto*. But the object must have been that Wheelock should assume the joint debt as his individual obligation, and secure it with his own separate

McGiven v. Wheelock.

property. In the absence of any explanation, we are brought to this inevitable conclusion. The question then recurs *why* he should do this, unless it had been agreed between him and his partner Penniman, that he should assume this debt? (3.) On the third day of April, 1846, Wheelock having become utterly insolvent, assigned all his property, real and personal, in law and in equity, to be applied to the payment of his debts, giving certain preferences, for the reason, as stated in the assignment, that his property was insufficient to pay all his creditors. Under these circumstances, he makes the \$1565 debt a preferred demand. Why should he thus devote his individual property (over and above that bound by the mortgage) to the payment of that portion which represented the joint debt, postponing and sacrificing many of his individual creditors, unless it had become *his own separate debt*? Would he have volunteered his own property to pay off Penniman's portion of the debt, unless he had agreed with Penniman so to do? Would he not have called upon Penniman to contribute his portion of the joint debt, and thus relieve his broken fortune from the pressure of this copartnership demand? Again; while he was making provision for the payment of this entire \$1565 demand as a preferred debt, if it was true that he was paying the half of this original joint debt for and on behalf of Penniman, (and not on account of a consideration theretofore received from Penniman,) he would lay the foundation for a just claim against Penniman for the one-half the amount advanced. And whether this claim existed as an interest in the mortgage, by way of an equitable substitution, or in a demand for money paid, it passed by the general assignment to his assignees. And the question then arises, why it is not found in the inventory of his property assigned? He could not have forgotten such a claim as this; and it is therefore reasonable to conclude that he had no such claim. How then can we escape the conclusion that he paid this joint debt because he had long since agreed to do so, and had received the consideration for so doing? But

II. We think that the mortgage has been substantially paid and satisfied; and that Mr. Clarke had no power to transfer it

McGiven v. Wheelock.

as a *subsisting security*, to the complainant. We have already seen that after the execution of the \$1565 mortgage, it *survived only as a collateral security*, to an equal amount of that mortgage which had been substituted for it and in which the joint debt had been merged. When therefor the \$1565 mortgage was satisfied, the mortgage in question being collateral to it, became *functus officio*. Wheelock's real estate, which was bound by the \$1565 mortgage, was advertised and sold by the assignees, *free from incumbrance*. The complainant became the purchaser of a part of it, and a Mr. Hawkes of another portion. The assignees were bound, therefore, to remove all incumbrances, and to convey the premises to the complainant unincumbered by the \$1565 mortgage. They desired, therefore, to pay off Mr. Clarke; and they were to receive the money to make this payment from the complainant as a part of his bid for the property. But it was arranged, by McGiven paying, or rather securing, to Mr. Clarke, the sum due upon this mortgage then amounting with interest, to \$1783, which Mr. Clark received in payment of his mortgage, and *receipted the amount to the assignees*. The assignees, being the owners of the fee of this land, subject to the \$1565 mortgage, having contracted to sell it free from incumbrance, insisted on paying up and satisfying that security. This would be done directly by their paying Clarke the \$1783, thus removing the lien of the mortgage, and McGiven paying it to the assignees as the purchase price of the premises. Instead of this direct mode, however, McGiven undertakes to satisfy the mortgage to Clarke, and Clarke to receipt the money to the assignees. This is, for all the purposes of this suit, a *payment of the \$1565 mortgage*. It is true that Mr. Clarke recites, in his receipt, that as *between him and McGiven*, he holds the old mortgage (for \$1565) as security for so much of the new mortgage which McGiven had given him. But he could in no event hold it as against *any one but McGiven*. It was kept alive only to *strengthen* the new mortgage which McGiven had given him. What *then* was the condition of the old joint mortgage? *That was held by Clarke not as a separate and independent security*. It ~~so~~

McGiven v. Wheelock.

cured a *part* of the debt for which the \$1565 mortgage had been given, and was held, solely, as collateral to it. It could not be assigned to any third person, by Clarke, to be collected as an independent security. It could only be resorted to, to supply any deficiency that might remain after exhausting the \$1565 bond and mortgage. It follows, that if that mortgage was *substantially paid to Clarke*, then the mortgage in question has ceased to be a subsisting security, and is satisfied. But suppose the \$1565 mortgage was *not* technically, and for all purposes, *functus officio*. It was satisfied by Clarke's own showing, except as between Clark and McGiven; and he was entitled to hold it only *against McGiven*, and as *collateral to McGiven's new mortgage*, Clarke could only enforce the \$1565 mortgage for that single purpose; and he could hold the joint mortgage and enforce it only as collateral to the \$1565 mortgage. He had no power, therefore, to assign it to McGiven, to be collected for his benefit. He could no more do that than he could collect the \$1565 mortgage and the joint mortgage also, and put the proceeds of both in his pocket. One of the assignees swears that this suit is not prosecuted for their benefit. And Clarke testifies that so far as he knows, it is prosecuted for McGiven's benefit. What right has McGiven to the proceeds of this mortgage? He has got the premises he bought of the assignees, unencumbered, and he has secured to Clarke precisely what he was to pay upon his bid, to the assignees. The simple truth is that Mr. Clarke has assumed to make a *gift* of this mortgage to the complainant. He derives all his right from Clarke, and he can not collect this mortgage and put the money in his pocket, unless Clarke could himself have done so.

The pretence upon which this most inequitable proceeding is attempted to be upheld and defended is, that Penniman has never paid his part of the mortgage debt, and that he ought to pay it. I have already advanced some reasons why we are at liberty to infer that Wheelock paid that debt, because some arrangement existed between him and Penniman, by which he had assumed it as his own. But suppose we are mistaken in that conclusion. Who now owns the claim against Penniman?

McGiven v. Wheelock.

Whether it exists in the form of an equitable interest in the mortgage, or in the form of a demand for money paid (or secured, so as in equity to amount to a payment,) in his behalf? Every such claim or demand, legal or equitable, which existed in favor of Wheelock passed by the assignment, to the assignees. They alone, therefore, can enforce it. It belongs to Wheelock's creditors. Mr. Clarke, (who is otherwise amply secured,) can not appropriate it. Nor can he give it away to McGiven. Nor can McGiven collect it in his own name for the benefit of Wheelock, in fraud of Wheelock's creditors, as there is too much reason to believe is the real object of this suit. It is true that equity will sometimes keep alive a mortgage which has been substantially satisfied; but it is always for the advancement of justice, and never to aid in the perpetration of a fraud, through the forms of law. Mr. Clarke had no equitable right to enforce this mortgage as a security independently of the mortgage given for the \$1565, which the assignees paid up, so far as they were concerned, and so far as to relieve the mortgage now in suit, from any claim Mr. Clarke had to it as collateral to the one paid by the assignees. If, then, Wheelock had any equitable interest in the mortgage against Penniman, by reason of his paying or securing Penniman's share, the assignees succeeded to that right; and having paid off the \$1565 mortgage, so as to extinguish it, *as between them and Clarke*, by the very terms of Clarke's receipt, they were entitled to have the joint mortgage (which Clarke only held as collateral to the other) delivered over to them on the payment of that other. Clarke, then, could not assign it to McGiven, and McGiven having no interest in it, can not equitably enforce it. This is the most favorable view of the case for the complainant. The better opinion is, as we think, that the mortgage which this suit is brought to foreclose, has ceased to exist as a subsisting security, and that the assignment of it by Clarke was a nullity. And if any claim exists against Penniman at all, it is a claim to be enforced by the assignees, on the ground of the satisfaction of a debt by Wheelock, only half of which he was bound to pay; in other words, a suit for contribution. To allow the complainant to

In the matter of Carpenter.

succeed in this foreclosure would enable him to perpetrate a fraud upon Penniman, or upon the assignees of Wheelock. And in either case such a result would be a reproach to the administration of justice.

The complainant's bill must be dismissed, with costs.

Decree accordingly.

7b 30
67 AD¹877

AT CHAMBERS, July 12, 1849. Before *Willard*, Justice.

In the matter of HIRAM CARPENTER and JOSEPH L. SNOW.

The office of commissioner of loans is a *county office*, within the meaning of section 2 of article 10 of the constitution of 1846.

The mode of appointment of commissioner of loans is not provided for in the constitution, except in the same section which declares that such county officers shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct.

The power of appointment by the governor and senate, which existed with respect to county officers, under the former constitution, is by necessary implication taken away by the constitution of 1846.

THE above named Hiram Carpenter and Joseph L. Snow presented a petition to WILLARD, justice, at chambers, under 1 R. S. 124, § 50, *et seq.*, for an order, that George G. Scott and Cyrus Perry, late commissioners of loans for Saratoga county, deliver over to the petitioners the books and papers in their custody, appertaining to the said office. The petitioners alledged that, being freeholders of said county, they were, on the 3d day of April, 1849, appointed by the governor, with the advice and consent of the senate, commissioners of loans for the county of Saratoga, in the place of George G. Scott and Cyrus Perry, whose term of office, as such commissioners of loans, had previously thereto expired. That a commission to that effect, signe^d

In the matter of Carpenter.

by the governor, and attested by the secretary of state, was forwarded to the clerk of Saratoga county, and was received by him on the 6th of April thereafter ; that the petitioners, within 15 days from the time of receiving such notice, executed the bond required by statute, and took the oath of office, and caused the said bond to be approved and filed, and on the 1st Tuesday of May, 1849, entered upon the duties of their office ; that certain books and papers appertaining to the said office were still in the possession of Scott and Perry, who refused to give them up to the petitioners.

It was not denied on the part of the defendants, that their official term had expired before the petitioners were nominated by the governor to the senate, but they insisted, that under the constitution of this state, the governor and senate had no right to make the appointment, and that the defendants were entitled to hold the office under 1 R. S. 117, § 9, until a successor in such office should be duly qualified ; that is, in the present case, until the legislature should determine the manner in which such officers should be elected or appointed, and the said office should be thereafter legally filled. They also insisted that the petitioners had not taken the requisite steps to qualify themselves for the discharge of the duties of said office.

McKean & Meeker, for the petitioners.

G. G. Scott, for the defendants.

WILLARD, J. The 2d section of the 10th article of the constitution of 1846, contains these words: "All *county officers* whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors or other county authorities, as the legislature shall direct ;" and the 4th section of the same article requires the legislature to prescribe by law the time of electing all officers named in that article. The appointment of commissioners of loans is not provided for in the constitution, and the legislature have failed to comply with this

In the matter of Carpenter.

requirement, so far at least as relates to the office now in controversy, and the question is, whether, by reason of such failure, the former mode of appointment under the late constitution, by the governor and senate, continues, or whether the incumbents may hold over, under 1 *R. S.* 117, § 9, until the legislature execute the duties enjoined on them by the constitution.

On the argument, it seemed to be conceded, that if "commissioners of loans" are *county officers*, within the meaning of the clause of the constitution just cited, the petitioners could not be appointed by the governor and senate. The first inquiry, therefore, is whether the office in question is a county office.

The office of commissioner of loans was created by the act entitled "an act authorizing a loan of moneys to the citizens of this state," passed April 11, 1808. That act authorized a loan "to the counties within this state," the counties composing the southern district excepted; and the third section empowered the person administering the government, by and with the advice and consent of the council of appointment, to nominate and appoint two reputable freeholders, resident in the city of New-York, and in each of the other counties of this state, to be commissioners for loaning money in the city and county of New-York, and each of the said counties in which they should be appointed." Other sections required the commissioners so appointed to take an oath of office and to give a bond to the people of the state, with sureties to be approved by certain county officers, conditioned for the true and faithful performance of their office and duties. The commissioners were required to loan the money to inhabitants of their respective counties, and to receive security by mortgage on improved lands in the same counties. And by the 12th section, it is enacted, that if any commissioners for loaning money *should remove out of the county*, die, or neglect or refuse to perform his duties, &c. "the person administering the government might appoint some other reputable freeholder, *resident in such county*, who should hold his office until the next meeting of the council of appointment.

The convention of 1821 abolished the council of appointment, and the constitution then adopted vested the appointing

In the matter of Carpenter.

power in most cases, in the governor with the consent of the senate. The 15th section of article 4, is in these words: "All officers heretofore elective by the people, shall continue to be elected; and all other officers whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people or appointed, as may by law be directed." Under this provision, the legislature, in 1823, vested the power of appointment of commissioners of loans in the governor and senate. (*Laws of 1823*, p. 343.) This law, by its terms, expired in three years after its passage; but by the act of Feb. 25, 1826, it was extended three years longer, (*Laws of 1826*, p. 44,) and was then incorporated into the revised statutes, without limitation as to time. (1 *R. S.* 114, § 15.) Thus the mode of appointment of the commissioners became changed, leaving the act in other respects unaltered.

The loan of the 14th of March, 1792, was created in pursuance of an act of that date. (See 2 *Greenl.* 404.) This was usually denominated the new loan, to distinguish it from the loan of 1786, which has since been called in. The loan officers under the act of 1792, are spoken of in the act, as officers for the county for which they were appointed. They were appointed by the judges of the court of common pleas and supervisors of the county, and were required to be freeholders and inhabitants of the county, and forfeited their offices on removing from the county. Their accounts were required to be annually examined by the judges of the court of common pleas and supervisors, and any deficiency which might arise from failure of title of the mortgagors, or from the premises mortgaged not being adequate to pay the amount due, was required to be assessed and levied upon the county. Thus the county was made responsible for the entire loan.

By the act of April, 1832, (*Laws of 1832*, p. 178,) the duties of the office of loan officer under the acts of 1786 and 1792, were transferred to, and vested in the commissioners of loans, and the office of loan officer was thereafter abolished. The loan of 1786 was required to be paid in, and the accounts closed, on or

In the matter of Carpenter.

before the first of December, 1832. Since that time, nothing remains of these early loans but the loan of 1792 and 1808, the whole of which were vested in the commissioners of loans.

These officers have always been treated as county officers. They have been required to keep their office in the county, to loan moneys only to inhabitants of the county, to be themselves freeholders and residents of the county, in order to be eligible to the office, and to forfeit their office on removing from the county. They are described in the several acts by which they were created, as county officers. They were required, with respect to the loan of 1792, to account annually to the county, through the judges and supervisors, and the county was responsible for the money loaned ; and this liability is still preserved by the consolidation act of 1832. In the revised statutes, the commissioners of loans under the act of 1808, are treated as administrative county officers, (1 R. S. 98 § 4, p. 102, § 16,) and their appointment, as before stated, vested in the governor and senate. (1 R. S. 114, § 15.) The loan officers under the act of 1792, were placed in the same class, but their appointment and removal were vested in the supervisors alone, two thirds of whom were required, to make an appointment or removal. The act of 1832 before cited, in effect abolished the last mentioned offices, and vested their duties in the commissioners of loans. Such was the law in relation to these officers, at the time of the formation of the present constitution.

The criterion by which to determine what is intended by the term "county officer," in the constitution, article 10, § 2, was incidentally decided by Edmonds, J. in the *matter of Whiting*, (2 Barb. S. C. Rep. 517.) He considered those to be county officers who were elected or appointed for a county, and were required to reside in and perform their duties in the county. And the senate judiciary committee of 1847, (See *Doc. of the Senate*, No. 61, p. 5, *majority Report*,) gave a similar definition to the same term. That committee reported against the power of the governor and senate to appoint surrogates and notaries public, even to fill vacancies, and their report was sustained by the majority of the senate. Under these definitions, the office

In the matter of Carpenter.

in question is clearly a county office. It has marks of locality which can not be mistaken. (1 R. S. 122, § 34, *sub. 4.* *Id.* 364, *et seq.*)

But it is urged that the commissioners of the code, in their first report to the legislature, have proposed a new designation of public officers, which will comprise the office in question under the head of "local state officers," and that thus the mode of appointment will not be affected by the constitution. (See *Code*, § 222 and notes.) On this it may be remarked 1st. That the code, as reported, has not yet received the sanction of the legislature. It is merely the recommendation of the commissioners. 2d. Under their designation of local state officers, the commissioners of the code, in a note to that section, embrace the commissioners for loaning the "United States deposit fund;" an office created by the act of April, 1837. (*Laws of 1837*, p. 129.) Those officers are different from the "commissioners of loans" now under consideration, although some of their duties are analogous. But 3rd. It is believed not to be competent for the legislature to increase their powers, or to relieve themselves from duties, by changing the definition of an office, which, at the adoption of the constitution, had a well known and definite signification.

If the office of commissioner of loans was a county office at the adoption of the constitution, as I have attempted to show, the second section of the tenth article has, by direct and necessary implication, taken from the governor and senate the power of appointment. By prescribing that they shall be elected by the electors of their respective counties or appointed by the board of supervisors or other county authorities, as the legislature shall direct, the constitution virtually excludes every other mode of appointment, and thus leaves the incumbents in office, or the office vacant, until the legislature shall direct a new mode of appointment, and successors, under such mode of appointment, have become duly qualified. Such, it seems to me, is the reasonable construction to be put upon the constitution and our legislation on this subject.

This construction is in itself reasonable, and harmonizes with

In the matter of Carpenter.

other parts of the system. The old incumbents can be at once ousted, whenever the legislature carry out the mandate of the constitution. It rests, therefore, with that body, whether the period shall be long or short. It was never intended that the legislature should have the power, by failing to do their duty, to continue the former mode of appointment during their pleasure. If the position contended for on the part of the petitioners be sound, it is in the power of the legislature to defeat altogether this branch of the constitution—a branch which was designed to break up the central appointing power, with respect to county officers—and to make them elective by the people or by the local authorities. It cannot be expected, that the legislature can, at a single session, execute all the various powers contemplated by the constitution. No imputation upon the good faith or integrity of that body is intended by any of the foregoing observations. All that is insisted on is, that so long as they fail, for any cause, to prescribe a mode for the election of county officers by the people or the local authorities, the old incumbents must continue to discharge their duties, or the office must remain vacant.

The office in this case, and the mode of appointment, were both created by the statute; and had the constitution been silent on the subject, both the office and the mode of appointment would have remained. But the constitution has changed the mode of appointment, as has been shown, and taken it from the governor and senate. The constitution of 1821 ceased to exist when the present constitution took effect. If the governor and senate can appoint commissioners of loans, it must be under a constitution that has passed away. The original act creating the loans of 1792 and 1808 contemplated a different mode of appointment, which was abrogated by the constitution of 1821. The legislation which conferred this power upon the governor and senate, was the offspring of that constitution, and ceased to be operative when that instrument ceased to be the organic law. We must look to the constitution of 1846, or some subsequent legislation, for the authority to appoint commissioners of loans, or other county officers, by the governor

In the matter of Carpenter.

and senate; and if none can be found, as we have seen none such exists, the appointment of the petitioners is a nullity.

It has been assumed, that, if the appointment of the petitioners is a void act, the old commissioners continue in office until the vacancy can be legally filled. Such is my own impression, from the cursory examination I have been able to give the subject. But this question is not necessary to be decided on this application. If the petitioners are not entitled to the summary aid of a judge, to require the delivery to them of the books and papers of the office, under the provisions of the revised statutes, it can not become material to inquire whether the defendants can legally hold over under the act, 1 *R. S.* 117, § 9, or not, and I do not propose to discuss or decide that question.

It has been urged on the part of the defendants that even if the governor and senate possess the power of appointment which is claimed by the petitioners, the latter have not, within the time required by law, executed such bond with sureties properly approved, and taken such oath of office, as entitles them to the summary aid provided by the statute. (1 *R. S.* 124, § 50 *et seq.*) I have not deemed it necessary to examine very closely this branch of the case. If the petitioners have no title to the office by reason of the constitutional impediment which has been considered, the other objections are quite superfluous. Even if a *reasonable doubt* existed as to the title of the commissioners to the office, a judge at chambers ought not in this summary way, to dispose of the question. This proceeding was only intended to provide for cases where the applicant had a *prima facie* title to the office, and the defendants were clearly and incontestably in the wrong. It is not the mode provided by law for determining the *title* to an office. That remedy now is by the substitute for the writ of quo warranto, in the code of procedure, §§ 428, 447. Mr. Justice Edmonds, in the *matter of Whiting*, (2 *Barb. S. C. Rep.* 518,) in delivering his judgment on a similar application, very properly observes "that if it could be made to appear that the governor and senate had no right under the constitution, to make an appointment, the complainant's *prima facie* right to the

In the matter of Carpenter.

possession would necessarily fall to the ground, and his application must be dismissed." In the *matter of Hodgkinson*, Kent, Circuit Judge, in a proceeding under this same statute, held "that the legislature never intended that a judge should exercise his power to enforce the delivery of books and papers against an officer *de facto*, where the title of the applicant to the office is questionable. He must have a *prima facie* case, free from all reasonable doubt. (5 *Hill*, 633, in note.) I fully concur in this opinion of the learned judge. This doctrine is also substantially asserted by the supreme court, in *The People v. Stevens*, (5 *Hill*, 616.)

The conclusions at which I have arrived may be summed up as follows: First. The office of commissioner of loans is a county office, within the meaning of § 2 of article 10 of the present constitution. Second. The mode of appointment of that officer is not provided for in the constitution, except in the same section, which declares, that such county officers shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities as the legislature shall direct. Third. The power of appointment by the governor and senate, which existed with respect to county officers, under the late constitution, is by necessary implication taken away; and, consequently the petitioners show no *prima facie* title to the office, and their application must be denied.

Motion denied.

STEUBEN GENERAL TERM, September, 1849. *Maynard, Welles, and Selden, Justices.*

SHELDON vs. WRIGHT.

Under the section of the act of April 18, 1813, relative to the court of probates, &c. providing that no administration shall in any case be granted until satisfactory proof shall be made, before the surrogate, that the decedent is dead, and died intestate, it is not sufficient for the applicant for letters of administration to set forth the facts in a petition, and swear that the matter therein stated are true, *to the best of his knowledge and belief*; without alledging any knowledge, or means of knowledge, or reasons for his belief.

But the objection is not available as against the jurisdiction of the surrogate, so as to render the grant of administration void. The evidence is at least colorable; and although objectionable as legal evidence its reception is merely error, and can only be objected to, on appeal.

Neither will the objection that no citation to the next of kin of the intestate was issued by the surrogate, go to the question of jurisdiction.

Under the 23d and 31st sections of the statute, upon an application to the surrogate for an order to sell the real estate of the decedent for the payment of debts, guardians for the infant heirs must be appointed, at least six weeks previous to the day for showing cause.

The ordinary presumption that a public officer has done his duty should never be allowed, to sustain a vital jurisdictional fact. But where the fact that on an application to a surrogate for an order to sell the real estate of a decedent, a guardian was appointed for the infant heirs, is made out independently, and without the aid of such presumption, the question being only as to the time when it was done, and the proof showing it might have been made in proper time, the law will presume that the appointment was made the requisite time before the parties in interest were, by the order, to show cause against the sale. In order to give the surrogate jurisdiction of the persons of the heirs, upon such an application, the provisions of the statute, requiring the order to show cause to be published for four weeks successively in two or more newspapers, must be strictly complied with.

And the fact that the publication required by the statute was duly made, is one which a party claiming title under a sale made in pursuance of the order of the surrogate is bound affirmatively to establish.

The direction of the statute, that the order to show cause shall be "immediately" published, is to be understood as only requiring the publication to be four successive weeks before the day for showing cause; and that the order shall be published as soon as conveniently may be.

The act does not require the first of the four successive publications to be four weeks before the day for showing cause. The requirement is satisfied by four successive weekly publications previous to the day.

Sheldon *v.* Wright.

What is a sufficient compliance with the provisions of the statute requiring an account of the personal estate, and debts, of the decedent, to be presented to the surrogate, signed and verified by the administrator.

Where, after a surrogate has made an order for the sale of all the real estate of the decedent, describing it by metes and bounds, but before any action has been had, under such order, the administrator discovers that the boundaries mentioned in the order do not comprise the whole of the real estate, the surrogate may, upon the petition of the administrator, vacate such order of sale, and make a new order for the sale of all the real estate of the decedent, as well that embraced in the former order, as the portion not included therein.

The omission of the administrator to verify his report of sale, does not affect the jurisdiction of the surrogate; that being a mere matter of practice.

Under the act of 1819, requiring that deeds of land sold by order of a surrogate shall set forth, at large, the orders for the sale, and confirming the sale, and directing the conveyance, it is not necessary to set forth the orders with literal precision. All that the spirit of the act requires is that the deed shall contain the substance of the orders. A mistake which is merely clerical, and can not mislead—such as a transposition of dates—will not vitiate the deed.

EJECTMENT, tried at the Cayuga circuit in April, 1848, before SILL, justice. The plaintiff claimed to recover one undivided fourth part of certain premises, being part of lot No. 78 in the town of Brutus, in the county of Cayuga. The cause was tried, by consent of parties, before the justice without a jury.

Upon the trial the defendant's counsel admitted that Aaron B. Sheldon, of the town of Brutus, died in the month of February, 1826, seised of the premises in question, leaving four children, of whom the plaintiff was one, who were his only heirs at law. That said children were all infants under the age of 21 years, the plaintiff being the oldest, and becoming 21 years old on the 27th day of April, 1827. That at the time of the commencement of this suit the defendant was in possession of said premises, claiming the entire title to the whole, and had been so in possession under the administrator's deed hereinafter mentioned, from about the first of April, 1827; whereupon the plaintiff rested. The defendant relied upon title through a deed from Sylvester Willard, as administrator of &c. of the said A. B. Sheldon deceased, to him the said defendant executed, in pursuance of an order of the surrogate of Cayuga county. A verdict was ordered in favor of the plaintiff, subject to the opinion of the supreme court.

Sheldon *v.* Wright,

. *William Porter*, for the plaintiff.

John Porter, for the defendant.

By the Court, WELLES, J. Various objections were taken by the plaintiff's counsel to the proceedings before the surrogate, which will be considered in their order. The plaintiff, on the trial, after the proofs were closed, moved for a verdict and judgment in his favor on the following grounds :

I. That the letters of administration granted by the surrogate to Sylvester Willard were void, because 1st. There was no proof before the surrogate of the death or intestacy of said Aaron B. Sheldon; and 2d. That no citation was issued to the next of kin of the deceased, prior to the granting of the said letters. The fact of the death of Aaron B. Sheldon, in February, 1826, and that he was a resident of the county of Cayuga at the time of his death, is admitted in the case. The objection is that such fact, and the fact of intestacy were not legally proved before the surrogate upon the application for letters of administration. The proof consists of the statement of the facts in the petition, which is verified by the oath of the petitioner, in which he states that "the material facts in the preceding petition by him subscribed are true, *to the best of his knowledge and belief.*" The petition also states that the deceased left no last will and testament, that the petitioner had been able to discover or had heard.

The statute in force when these proceedings were had (1 *R. L.* 445, § 5) provides "that no administration shall in any case be granted until satisfactory proof be made before the judge of the court of probates, or surrogate, to whom application for that purpose shall be made, that the person of whose estate administration is claimed, is dead, and died intestate." If this question was before the court on appeal from the decision of the surrogate in granting the letters of administration, I think we should hold the proceeding irregular; as there does not seem to be any legal proof of the facts required by the statute. The affidavit seems to be insufficient, as a verification of the petition. It

Sheldon *v.* Wright.

merely states the material facts to be true, *according to the best of the petitioner's knowledge and belief*. It does not alledge any knowledge or means of knowledge, or reasons for the belief, &c. It was not legal evidence of any of the facts contained in the petition. (*Brown v. Hinchman*, 9 John. 75. *Vosburgh v. Welsh*, 11 John. 175. *Tallman v. Bigelow*, 10 Wend. 420. 2 *Cowen & Hill's Notes*, § 864. *Matter of Bliss*, 7 Hill, 187, and cases there cited.)

But the objection is not available as against the jurisdiction of the surrogate, so as to render the grant of administration void. The evidence contained in the affidavit was at least colorable, and although it was objectionable as legal evidence it was merely error, and could only be objected to on appeal. The 10th section of the statute above referred to requires the surrogate, upon granting administration, to take from the administrator a bond, &c. with two or more competent sureties, &c. In *Bloom v. Burdick*, (1 Hill, 130,) the surrogate had taken only one surety, and the court held the omission to take a proper bond, an error to be corrected on appeal, and not a defect of jurisdiction which would render the whole proceeding void. In *Tallman v. Bigelow*, above cited, which was a certiorari to a justice of the peace, it appeared that the suit before the justice was by attachment issued upon affidavits stating the facts which were relied upon to entitle the party to an attachment, upon information and belief only. The court reversed the judgment, holding the affidavits defective, but stating at the same time that "there probably was sufficient to protect the justice and all others acting under the judgment, until its reversal." Unless the affidavits were sufficient to give the justice jurisdiction there would be no protection to him. In *Vosburgh v. Welsh*, also above cited, Thompson, J. says, "A mere error in judgment as to the legality of the proof offered, would not make the magistrate a trespasser by issuing the attachment. But such proof, in order to give jurisdiction to the justice, ought at least to be colorable."

With respect to the objection that no citation to the intestate's next of kin was issued by the surrogate, in pursuance of the

Sheldon v. Wright.

6th section of the act, I incline to think it should be disposed of in like manner with the one relating to the proof of the death and intestacy of the decedent. I think it would have been a good objection on appeal, but that it does not go to the question of jurisdiction. The case shows that the widow of the deceased filed with the surrogate a renunciation of her right to letters of administration, with a recommendation for the appointment of Willard; and the case shows the children were all infants. (*Perley v. Sands*, 3 *Edw. Ch. Rep.* 327. *Flinn v. Chase*, 4 *Denio*, 90.)

II. The next objection, taken at the trial, to the proceedings before the surrogate is, that a guardian for the infant heirs was not appointed until some days subsequent to the granting of the order to show cause why the sale should not take place. The petition for the sale bore date and was filed with the surrogate on the 6th day of September, 1826, upon which the order to show cause was on the same day made and entered, by which all persons interested, &c. were required to show cause, &c. before the surrogate at his office in the town of Ledyard in the county of Cayuga, on the 19th of October then next, at 10 A. M. The order appointing a guardian for the infants bears date in September, 1826, but the day of the month is left in blank. The caption is in this form: "At a surrogate's court held in and for the county of Cayuga at the surrogate's office in the town of Ledyard, on the day of September, 1826." The 31st section of the act requires that in all cases where a petition shall be presented for the sale of the real estate of the deceased, and one or more of the devisees or heirs shall be infants, a discreet and substantial freeholder shall be appointed a guardian for such infants, for the sole purpose of appearing and taking care of their interests in such proceedings. It may be a question as to what time in the course of the proceedings to sell the real estate, the appointment of a guardian for the infants must take place. The 23d section of the act provides that the order to show cause, &c. shall direct all persons, &c. to appear before him at a certain day and place to be specified, not less than six nor more than ten weeks after the day of making the

Sheldon v. Wright.

order, to show cause, &c. which order shall immediately thereafter be published for four weeks successively in two public newspapers, &c. I incline to think the appointment should be made at least six weeks before the day of showing cause mentioned in the order; otherwise the infant heirs could not have the full benefit of the notice which the act intended to give them. If not, what time should be deemed sufficient? If less than six weeks, I see not why one day prior to the order of sale would not satisfy the statute. The heirs have a deeper interest to be looked after than any other persons. Indeed, they and the creditors are about the only persons who have any interest in the proceedings. It is in the nature of an issue between them. It is all important that the heirs be represented when the order for sale is applied for. And as personal notice is not required to be given, such of the heirs as are infants should be placed on an equal footing with others interested, by having a guardian to take charge of their interests for the same length of time before the day appointed; otherwise the guardian will not stand an equal chance of seeing the published order, without which the order to show cause would be to them, practically, a nullity. The next inquiry in this connection is, when was the appointment of guardian in fact made? All that the case shows on the subject is that it was in the month of September, 1826. No parol or other evidence was given tending to prove what day of the month it was done, nor how long before the 19th day of October, (the day of showing cause.) All that can be collected on the subject is that it was on or after the 6th day of September, and before the 1st day of October. If it was the 30th day of September, it was less than three weeks. If we suppose it to have been done on the 6th day of September, which is the earliest possible day the evidence will admit of, then it will appear to have been precisely six weeks and one day. Upon the whole, I am prepared to hold at this point in the case, that the ordinary presumption that a public officer has done his duty, should apply. I do not think that such presumption alone should ever be allowed to sustain a vital jurisdictional fact, such as I regard this to be; but inasmuch as the fact that

Sheldon *v.* Wright.

a guardian was appointed is made out independently, and without the aid of such presumption, as the question is only as to the time when it was done, and as the proof shows it might have been done in proper time, the law will presume that the appointment was made the requisite time before the parties in interest were, by the order to show cause, &c. (*Jackson ex dem. McFail and others v. Crawford*, 12 Wend. 533. *Ford v. Walsworth*, 19 Id. 334. *Bloom v. Burdick*, 1 Hill, 136.)

III. The next objection was that the order was not published four weeks successively, prior to the day therein mentioned for showing cause, in two of the public newspapers printed in this state. The order was published in the "*Free Press*," a newspaper printed in Auburn, Cayuga county, once in each week for four weeks successively, commencing on the 20th day of September, 1826; and in the "*Cayuga Patriot*," printed in the same place, once in each week for the same number of weeks, commencing on the 27th day of September, 1826. The statute (1 *R. L.* 450, § 23) in directing the publication of the order, uses the following language, "which order shall immediately thereafter be published for four weeks successively in two or more of the public newspapers printed in this state, one of which shall be the paper, if any, published in the county where probate of any such will shall be had or administration granted," &c. I have no doubt whatever that it is essential, in order to give the surrogate jurisdiction of the persons of the heirs, that this provision of the statute should be strictly complied with. It is the only process to bring them into court, and without it they are without their day in court. And I think that notice for the full time required by the statute is equally indispensable; that short notice would be as no notice. And I think it was a fact which the defendant in this case was bound affirmatively to establish. This was so held in the late case of *Corwin v. Merritt*, (3 *Barb. S. C. Rep.* 341.) I think, however, that the proof in this case clearly establishes a compliance with the law in this respect. 1st. With respect to the time of the first publication of the order, the statute is that the order shall be *immediately* published, &c.; and it was contended upon the argument, that as the order was

Sheldon *v.* Wright

made on the 6th of September, and the first publication in one of the newspapers not until the 27th, it was not *immediately* published. In most cases it would be impossible to comply with the statute literally, if by the word "*immediately*" it is to be understood instantly, or upon the same day of making the order. I think the statute only requires the publication to be four successive weeks before the day of showing cause, and that the only force which can be given to the word "*immediately*" is a direction that the order be published as soon as conveniently may be. Any other construction would be impracticable. It is claimed that the notice, so far as one of the papers was concerned, (the Cayuga Patriot,) was not published four weeks. That the first publication, which was on the 27th day of September, was less than four weeks before the 19th day of October, when the parties were required to show cause, &c. This, as a matter of fact, will be seen, upon a computation of the time, to be true. But I do not understand the act to require the first of the four successive publications to be four weeks before the day of showing cause. The requirement is satisfied by four successive weekly publications before the day. That was done in this case. That was the practical construction of the provision of the insolvent laws requiring notice to creditors, &c. to be published in one class of cases six weeks, and in another ten weeks.

IV. The next objection taken by the plaintiff's counsel at the trial, to the proceedings before the surrogate, was as follows: "That an account of the personal estate and debts of the said Aaron B. Sheldon, at the time of the application by said Willard, was not presented to the said surrogate, or filed in his office, and if so, that such account was not verified." The case shows that on the 6th day of September, 1826, the administrator presented to the surrogate a petition duly verified, for the sale of the real estate of the deceased, containing statements which, by the statute, would entitle him to an order to show cause, &c. referring to an account subjoined, of the personal estate of the deceased. The account is set forth at length in the case, and consists of a list of the creditors of the deceased, with the amount due to

Sheldon v. Wright.

them respectively, amounting in the aggregate to \$1665,76, besides interest; a statement of the debts due the estate, with the name of each debtor, and the amount due from them respectively, amounting nominally in the aggregate to \$87,23, with a statement that he, the administrator, considered them all bad, excepting a demand against one Finch of \$37, which he considered doubtful. Annexed to the account is a statement as follows: "An account of moneys received by Sylvester Willard, the administrator, on account of Aaron B. Sheldon's estate. The amount of personal property as appraised in the inventory, is \$245,11, exclusive of what was reserved for the benefit of the widow, to wit, \$87,63, which personal property was sold at public auction according to law. The amount of sales in cash, was - - - - - \$ 62,25

The amount of the balance for which notes were

taken, and which I consider good, was - - - - - 285,58

\$347,83"

The case also shows that on the said sixth day of September, 1826, the administrator duly filed with the surrogate an inventory and account of the goods, chattels and credits of the deceased, duly verified by the administrator, accompanied by the usual affidavit of the appraisers. It appeared by this inventory that the aggregate value of the personal property, exclusive of that set apart for the use of the family of the deceased, was \$245,11, and inclusive of that so set apart, was \$341,74. I have no doubt but this account was a full compliance with the statute. It presented a plain exposition of the condition of the estate, and exhibited a *prima facie* case of the necessity for a resort to the real estate for the payment of the debts. It contained a detailed statement of the debts due from the estate. It then accounted for the personal estate which had come to the hands of the administrator, in general terms, it is true, but by reference to the inventory which was on file with the surrogate. That, in my opinion, was quite as well as to recapitulate the items from the inventory. It was unnecessary to give a detailed statement of the notes taken by the administrator upon

Sheldon *v.* Wright.

the sale of the personal property. No useful purpose could be answered by it, as they were all good, and the administrator was willing, undoubtedly, to have them treated, for the purposes of the application he was then making, as so much money in his hands.

It is objected that the account of debts due from the estate, did not show their character. The act does not require this, in terms. Its language is, that the administrator or executor shall "make a just and true account of the said personal estate and debts, so far as he or she can discover the same," &c. If any person interested, should desire to know the character of the debts, with a view to ascertain whether they were fictitious or genuine, or for any other purpose, there is nothing to hinder his examining the administrator or creditors under oath touching the subject.

It is also objected that the account of the personal estate and debts is not signed or verified by the administrator. In the first place, the act does not direct the account to be signed or verified; and in the next place, it was in fact, annexed to the petition which was duly verified, and contained a reference to the account in these words; "that said account is herewith ready to be delivered as this court may direct." There was no other account in the case to which the petition could have had reference.

V. and VI. This case shows that on the 8th day of December, 1826, the surrogate made an order for the sale of the whole of the real estate whereof the said Aaron B. Sheldon died seised, thereafter mentioned and set forth, and the order proceeded to describe the same particularly, being seventy acres of land. That on the 8th day of January, 1827, the administrator presented to the surrogate a petition, representing that since the order of sale of the 8th of December, he had discovered that the boundaries mentioned in that order, of the land of the decedent, and which were supposed to contain all the real estate of which he died seised, did not comprise the whole of such real estate, and praying that the order of sale so made might be vacated, and a new order granted for the sale of the whole of such real

Sheldon v. Wright.

estate. This last petition was duly verified and accompanied by an affidavit of another person tending to corroborate the statement of facts contained in the petition. The surrogate thereupon, on said 8th day of January, made another order reciting the order of the 8th of December, the discovery by the administrator of the other land owned by the deceased at the time of his death, that it appeared that no sale had yet been made of any part of the said real estate, and that it was requisite and necessary, in order to pay the debts of the deceased, that as well the lands and premises thereafter particularly described, as those mentioned and specified in the last mentioned order or decree should be sold, and ordered, adjudged and decreed that the administrator sell in the manner prescribed in the last mentioned order or decree, with respect to the land and premises therein described, the estate, right, title, &c. whereof the said Aaron B. Sheldon died seized, in and to all that certain piece or parcel of land, situate, &c. describing the same particularly, being twenty-four $\frac{1}{4}$ acres of land, being part of lot No. 78, in the town of Brutus, in the county of Cayuga. The plaintiff, at the trial, objected to these orders as follows: "That the said first order of sale was void for the foregoing, among other reasons." Also, "that the second order of sale was void, for the foregoing reasons, as well as the following, to wit; it was entered or granted before any action was had on the first order to show cause with reference to it, and without any proper application being made, or any necessity appearing therefor." The validity of the objection to the first order of sale depends upon the objections made to the previous proceedings, which have been considered and overruled. With respect to the second, whatever may be said of its regularity, I think the surrogate had jurisdiction to make it. He intended in the first order, to direct a sale of the whole of the real estate of the deceased, and supposed he had done so. In the first order of sale, it is recited that no cause or objection was shown at the time and place specified in that order, why the whole of the said real estate, or a part thereof, should not be sold; and that upon hearing and due examination of the allegations and proofs of

Sheldon v. Wright.

the administrator, it was found that the personal estate of the deceased was insufficient to pay his debts ; that the whole of the personal estate had been applied towards the payment of said debts ; and that it was requisite and necessary to sell the whole of his real estate for the payment of his debts ; it was thereupon ordered, adjudged and decreed that the whole be sold, &c. I am aware that it may be said the surrogate should direct to be sold, only so much of the real estate as appears to him, upon examination, to be necessary for the payment of the debts ; and that in that view, he should look at the amount of debts remaining unpaid, after all the personal estate has been applied, and upon the quantity and probable value of the real estate necessary to be sold for the purpose of paying the balance ; and having done all this, the surrogate in the present case, ordered the first parcel of seventy acres to be sold, &c. And it was urged upon the argument at bar, that before an order could be made for the sale of other land, the power of the first order should have been exhausted ; and that if a further sale should afterwards become necessary, an order for that purpose should be obtained in the same way as the first was procured. It is to be observed, that the first order adjudged a sale of all the real estate ; and before any proceedings had been taken under that order, the second order was made, in which it was adjudged to be necessary to sell the other piece. In this, I think the surrogate acted within his powers, and if so, his acts can not be drawn in question, in this collateral way.

VII. The seventh objection made at the trial, by the plaintiff's counsel, was as follows : "That the report of sale was not verified, and does not show that the premises were sold between the hours of 9 A. M. and the setting of the sun, on the day of sale." The latter part of this objection, relating to the time of day, &c. was virtually abandoned upon the argument. With respect to the residue of this objection, it does not appear by the case that the administrator's report of the sale was verified. And the case expressly states that it was not. Neither the act of 1813, (1 R. L. 444,) nor the act of 1819, (Ses. L. of 1819, p. 214,) requires it to be verified. It strikes me it would have

Shekton v. Wright

been better practice to have had it done; but it was at most a matter of practice, and the omission certainly cannot be successfully urged as a jurisdictional objection to the proceedings of the surrogate. I am not aware what the practice usually was before the surrogate. If it was to dispense with the verification of the report in such cases, perhaps it was on the ground that the administrator, in making the report, acted under the oath of office which he took upon receiving the letters of administration.

VIII. The next objection was "that the order of confirmation was void for the foregoing reasons." The consideration of the previous several objections, of course disposes of this.

IX. The premises were sold by the administrator in pursuance of the orders of the surrogate, on the first day of March 1827, and were struck off to, and purchased by, the defendant for the sum of \$1175. Upon the sale being reported, the surrogate, by an order dated March 20, 1827, confirmed the sale and directed that the administrator execute and deliver a deed of the premises to the defendant in pursuance of the sale. A deed was accordingly executed and delivered to the defendant on the 26th day of June 1827. This deed, in setting forth the first order of sale, states it to have been made on the 6th day of September 1826, (the true date being the 8th day of December of that year,) and in copying into the deed the recitals in this order, of the petition for such sale, it states that the petition was presented on the 8th day of December last past, (the true time of the presentation of that petition being the 6th of September 1826,) thus reversing the two dates. In other respects the order is correctly and truly set forth at large in the deed. The second order of sale and the order confirming the sale and directing the conveyance, are both correctly set forth at large in the deed. The objection taken at the trial was that the orders of sale were not set out at large in the deed.

The act of 1819, (*Laws of 1819*, p. 215 § 3,) requires that such conveyances shall set forth at large the orders directing the sales, and the orders confirming the sales and directing conveyances. In the case of *Rea and others v. McEachron*, (13

Sheldon v. Wright.

Wend. 485,) it was decided that the omission to have an order of confirmation &c. entered is fatal at law to the purchasers' title. And in the case of *Atkins and wife v. Kinnan*, (20 *Wend.* 241,) the omission to set forth these orders in the conveyance was held equally fatal. But I do not understand it to be necessary, under the statute, to set forth the orders with literal precision. The deed should contain the whole of their substance, and that, I think, is all the spirit of the act requires. (*Atkins and wife v. Kinnan, supra.*) In the present case the mistake complained of was merely clerical, and could mislead no one. It contained its own antidote. The mistake in the transposition of dates is at once apparent. In reciting the first order of sale, the deed must be regarded as speaking on the 26th day of June 1827, and saying that on the 6th day of September 1826, the surrogate made an order of sale founded upon a petition, &c. presented on the 8th day of December 1826, which is seen to be an absurdity. And by reference to the 2d order of sale, which is correctly set forth in the deed and truly and correctly recites the first, the mistake is made still more apparent and leaves no doubt of what the true reading of the first order must be; or that the change of dates was the merest clerical error.

X. But supposing I am wrong in all this, and the deed of the 26th of June is inoperative for the reason alledged, the new deed from the administrator to the defendant, which the case shows was dated and delivered October 2d, 1847, in which all the necessary orders of the surrogate were set forth at large, is available to the defendant to heal the supposed defects in the first deed, and to vest the title to the premises in question in him. I can see no objection to giving this second deed full effect, on the supposition that the other was void, and to treat it as relating back to the time of sale, in analogy to deeds of sheriffs on sales under executions. (3 *Cowen*, 81.)

The result of the foregoing labored and somewhat protracted examination is, that the defendant is entitled to judgment upon the case.

Judgment for defendant.

CHENANGO GENERAL TERM, September, 1849. *H. Gray, Mason, and Morehouse, Justices.*

SCOTT *vs.* MCGRATH.

Giving to an agent unlimited power to sell an article, without restrictions, embraces the power to do what is ordinarily done upon such sales: to wit, to speak of the quality and condition of the article sold, and to contract with reference to its quality and condition. *Per MASON, J.*

The rule is very different, however, where the principal restricts the power of his special agent upon that subject. In such case the restrictions must be strictly pursued, or the employer will not be bound.

Accordingly, where the owner of a horse employed a person to sell the same, or to exchange him for another horse suitable for staging, and the agent exchanged the horse for a span of ponies not suitable for staging, at the same time warranting the horse exchanged by him; it was held, in an action against the principal, upon the warranty, that he was not liable.

THIS was an action brought to recover damages for a breach of warranty on the exchange of a horse of the defendant for a span of horses of the plaintiff. The cause was tried at the Tompkins circuit in September, 1848, before Justice Morehouse. The trade was made between the plaintiff and one Gifford, the agent of the defendant. The defendant refused to ratify the trade, claiming that the agent had transcended his authority, and that he, the defendant, was not bound. The only evidence of the agent's authority consisted in the testimony of the agent, Gifford, himself. He testified that the defendant was a stage proprietor, and that he, the witness, was in his employ, and was his agent at Jefferson; that in the month of July, 1849, he exchanged a horse with the plaintiff for a pair of small ponies, and paid \$22,50 as the difference; that he was authorized by the defendant to sell the horse, or exchange him; that the defendant's directions were to sell the horse, or trade him for a horse suitable for staging; that he gave no other directions, and that he, the witness, never had sold, or in any other instance traded off, a horse belonging to the defendant. That when he returned with the ponies, the defendant refused to take them, or ratify the trade, and that the agent settled with his

Scott v. McGrath.

principal and paid him \$75 for the horse, and kept the ponies himself. He also swore that the ponies were small, ~~and unfit~~ for staging. Upon this evidence the justice charged the jury, "that the authority from McGrath to Gifford was general, to sell or exchange, and he was therefore bound by Gifford's contract with Scott; that if Gifford was authorized to deal with the article, whether his agency was general or special was immaterial, unless the plaintiff had notice." To this charge the defendant's counsel excepted. The warranty was proved, and the breach, and the jury found a verdict for the plaintiff for \$78, and the defendant moved for a new trial.

Ferris & Cushing, for the plaintiff.

Diven, Hathaway & Woods, for the defendant.

By the Court, MASON, J. Although I have had doubts upon this case, I am satisfied, after a careful examination, that the defendant is not liable. We cannot, upon this evidence, regard Gifford as the general agent of the defendant, in this particular trade. It is true, he says he was in the employ of the defendant, and that the defendant was a stage proprietor, and he was his agent at Jefferson. He says, however, at the same time, that he never sold a horse for the defendant, before, or traded one for him, and that he was especially empowered to sell this horse or exchange him. I do not understand, therefore, when he says that the defendant is a stage proprietor, and that he is in his employ, and is his agent at Jefferson, that his employment as agent has been, or is, to traffic in horses for the defendant. And I should not understand that such was the employment of an individual were he to say that he was agent for a stage proprietor at a particular point upon his line of staging. I think it could be hardly said, in such a case, that the witness meant to be understood that he was a general agent for the proprietor, to traffic in horses, but rather his agent to receive daily fare and look after passengers, and see to the daily interests of running the stages. A general agent is one put in the

Scott v. McGrath.

place of his principal, to transact all manner of business, or to transact all his business of a particular kind. (6 *Bac. Abr.* 560, *Bouv. ed. Dunlap's Paley on Agency*, 199. 2 *Kents' Com.* 620.) A special agent, on the contrary, is one employed to do a specific act, or certain specific acts. (6 *Bac. Abr.* 560, *Bouv. ed. Dunlap's Paley on Agency*, 202.) The general agent has authority to bind his principal by all acts within the scope of his employment, and that power cannot be limited by any private order or direction not known to the party dealing with the agent. (*Dunl. Paley on Agency*, 200. *Jeffrey v. Bigelow*, 13. *Wend.* 520.) The rule as to a special agent is well defined by Chancellor Kent. He says, "An agent constituted for a particular purpose, and under a limited power, can not bind his principal if he exceeds his power. The special power must be strictly pursued." He adds, "Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power." Paley lays down the same rule, although in different language. He says, "A special agent does not bind his employer unless his authority be strictly pursued; for it is the business of the party dealing with him to examine his authority; and therefore, if there be any qualification or express restriction to the commission it must be observed: otherwise the principal is discharged." (*Dunl. Paley on Agency*, 202.) This is an elementary principle of the common law; and the doctrine has been too long and too well settled, by a long series of adjudications, both in England and in this country, to permit a discussion of the soundness of the principle upon which the rule is founded. And on looking into the books should we find, as was alledged by the plaintiff's counsel we should, any adjudged case advancing an opposite doctrine, we should not regard such case as authority. It has been supposed by the plaintiff's counsel that the courts in this state, in one or two recent cases, have encroached upon this rule by advancing a doctrine in conflict with the rule. And we were referred to the cases of *Sandford v. Handy*, (23 *Wend.* 260,) and *Nelson v. Cowing & Seymour*, (6 *Hill*, 336,) as holding an opposite doctrine. I have bestowed a careful examination upon these cases,

Scott v. McGrath.

and I find that they do not decide any thing in conflict with the rule above laid down. *Sandford v. Handy* was the case of a special agent; and all the case decides is that the representations for which the party was sought to be made liable were within the scope of the agent's authority, and therefore the court held the principal liable. And the chief justice, who delivered the opinion of the court, recognizes the rule for which we have contended, in the following language put by way of illustration of the rule: "Thus in the case of a factor or servant of a horse dealer in the habit of making sales, if the factor or servant should be specifically instructed, in a given instance, the instructions would not be binding if in conflict with the general authority derivable from their occupations. But if a person who had no such general character should be employed to do a particular act, such as selling a lot of goods, or a horse, and in respect to which his power is specifically limited, then if he exceed the limitations, his principal will not be bound." All that the case of *Nelson v. Cowing & Seymour* decides, in reference to the point under consideration, is, that a special agent, authorized to sell an article, is presumed to possess the authority or power to warrant the quality and condition of the article. This is upon the principle that the general power to sell the article, without any restrictions imposed, carries with it the power or authority to contract as to the quality or condition of the thing sold; and this is an old and familiar rule. (*Alexander v. Gibson*, 2 Camp. 555. *Fenn v. Harrison*, 3 T. R. 757. 5 Esp. 55. *Dunlap's Paley on Agency*, 197.) Paley lays down the rule as follows: "An agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer, so as to bind him by that indorsement. And so a servant intrusted to sell a horse may warrant, unless forbidden. And that it is not necessary for the party insisting on the warranty to show that he had any special authority for that purpose. (*Dunlap's Paley on Agency*, 198. *Alexander v. Gibson*, 2 Camp. 555. 5 Esp. Rep. 55. 3 Id. 65.) The cases proceed upon the principle above stated, that the unlimited power to sell without restrictions embraces the power to do what is ordinarily done upon

Scott v. McGrath.

such sales; to wit, to speak of the quality and condition of the article sold, and to contract with reference to its quality and condition. The rule is very different, however, where the principal restricts the power of his special agent upon this subject. In such case the restrictions must be strictly pursued, or the employer will not be bound. This principle is well exemplified in the case of *Fenn v. Harrison*, (3 T. R. 757,) in which the defendants employed one F. Hewett to get a bill of exchange discounted, of which they were the owners. They instructed Hewett to carry the bill to market and get cash for it, but that they would not indorse it, and it was held that Hewett had no power to bind them by contract of indorsement or otherwise. And so where the employer directs his special agent to sell the horse, but not to warrant him, the agent can not bind his employer by a warranty. (*Dunlap's Paley on Agency*, 210. 6 *Bac. Abr.* 560, *tit. Merchant and Merchandise, B.*) There is an illustration of the rule put by Justice Ashurst in the case of *Fenn v. Harrison*, (*supra*,) which I do not exactly understand. He says, "If a person keeping livery stables and having a horse to sell directed his servant not to warrant him and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant." But he adds, "If the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." I find this case stated in precisely the same language in Bacon's Abr. and in Paley on Agency. (See 5 *Bac. Abr.* 560, *Bouv. ed.*; *Dunlap's Paley on Agency*, 203.) The case is very loosely stated, and well calculated to mislead; and in the broad and unqualified language in which the case is put, I am not prepared to yield assent to the proposition. If the livery stable keeper has a servant whose only business is to

Scott v. McGrath.

clean his stables and see to the feeding and taking care of his horses, and to harnessing them when ordered, and who has never been permitted to make sales or exchanges of the horses, were sent by his master to make sale of a particular horse, with special instructions not to warrant, I do not hesitate to declare that such servant or agent could not bind his employer by warranty. If, on the contrary, the livery stable keeper permits his servant to sell or exchange, then the rule is different; for then the agent is acting within the scope of his general authority. But to apply the principle to the case under consideration. Here the defendant empowered his agent Gifford to sell the horse in question, or to exchange him for another horse suitable for staging. There was nothing said about warranting. In case Gifford had sold his horse, he would undoubtedly have been authorized to bind the defendant by warranty, as there were no restrictions in reference to warranting upon the sale, for the reasons above stated, and for the reason which is perhaps more explicitly stated by Mr. Paley than we have stated it above. He says, "Inasmuch as the power to do any act comprises a power to do all such subordinate acts as are usually incident to, or are necessary to effectuate, the principal act, in the best and most convenient manner, it is necessary even in regard to a special agent if it be intended to exclude from his authority any circumstance which would otherwise fall within it, that it should be done by express directions." In reference to exchanging the horse in question, however, the agent is limited by express instructions, to wit, to exchange for a horse suitable for staging. The question arises, then, can this agent bind the defendant when he exchanges the horse for a pair of small ponies, concededly unfit for staging, and pays \$22,50 as the difference? I do not think he can, while we recognize the rule that the special agent can not transcend his authority, and bind his principal. I lay out of view, entirely, in this case, the fact that the defendant is a stage proprietor, and that the witness Gifford has sworn that he was in the employ of the defendant and was his agent at Jefferson; because the agent swears at the same time that he had never sold or traded off a horse for the defendant, before. And

Lathrop v. Hoyt.

when we have the additional fact appearing in the case, that he assumed to sell the horse in question because of express authority given him by the defendant, I do not think that we should be justified in saying that Gifford was the general agent of the defendant at Jefferson to buy and sell, or to sell and exchange horses. The learned judge, in his charge to the jury, stated that "*the authority from McGrath to Gifford was general, to sell or exchange.*" His authority to sell was general, while, on the contrary, his authority to exchange was limited. The learned justice also stated "that if Gifford was authorized to deal with the article, whether his agency was general or special was immaterial, unless the plaintiff had notice." This is clearly wrong. The judge seems to have overlooked the distinction between a general and special agent. If Gifford was the general agent of the defendant, in the sale or exchange of horses, then he might bind the defendant, however much he might transcend his instructions. If, on the contrary, he was the special agent of the defendant to sell or exchange the horse in question, then he can not bind him in any case where he has disobeyed express instructions. I think that the judgment in this case must be reversed, for the reasons already stated. And as the plaintiff may supply the proof upon a new trial, the cause must be retried if the plaintiff wishes another trial.

New trial granted.

SAME TERM. *Before the same Justices.*

7	59
87h	76
7b	59
157a	389

LATHROP vs. HOYT.

Where the defendant, at the plaintiff's request, agreed, by parole, that he would go and attend a sale of the plaintiff's farm, under a decree of foreclosure; that he would bid off the premises and take a deed in his own name; that he would give the plaintiff an opportunity to repay him the amount of his bid, and have

Lathrop *v.* Hoyt.

a reconveyance of the premises ; and that the plaintiff should have two weeks' notice to pay the amount ; and the defendant accordingly bid off the farm, and took a deed in his own name ; *Held* that the agreement was void, as being within the statute of frauds, and would not support an action.

THIS was an action brought to recover the sum of \$317 with interest from the 15th day of August, 1847, claimed to be due from the defendant to the plaintiff. The complaint alledged that prior to the 2d day of May, 1846, the plaintiff was the owner of a farm of fifty and one-fourth acres of land, situate in the town of Barton, county of Tioga, and that the same was subject to a mortgage bearing date May 7th, 1841, executed by one Isaac E. Fisher to Joseph Hill, to secure the payment of \$300, on or before the 25th day of July, 1845, with interest. That on or about the 12th day of September, 1845, proceedings were instituted to foreclose the said mortgage, in chancery, in favor of the said Joseph Hill, and a decree subsequently obtained, to sell the land to satisfy the balance due on said mortgage, with the costs of foreclosure and sale, amounting to about the sum of \$484 ; and that the land was advertised to be sold under said decree, at the village of Owego in the county of Tioga, on the 2d day of May, 1846. That two or three days before the sale the plaintiff applied to the defendant for assistance to enable him to pay the amount of said decree and costs ; and that after some negotiation, it was finally agreed between them that the defendant should let the plaintiff have the money, and that in order to secure the repayment the defendant should bid off the land, take a deed in his own name, and give the plaintiff two weeks' notice when he wanted the money repaid. The complaint also alledged that the defendant, in accordance with said agreement, bid off the land on the day of sale, for about the sum of \$484, and took a deed in his own name ; that in the month of August, 1847, the defendant sold the land to one Hollister, for the sum of eight hundred and fifty dollars ; that from the time the defendant bid off the land until the time he sold the same to Hollister, he never demanded the money of the plaintiff, or requested him to pay it. The complaint further alledged that the defendant became, and was, the trustee of the

Lathrop *v.* Hoyt.

plaintiff in regard to said land, and as such was liable to account and pay over to the plaintiff, all moneys received of the said Hollister, over and above the amount so bid by him for the land, with interest and his reasonable expenses; and that the sum so received by the defendant for which he was liable to account amounted to \$317 at the time of the sale to Hollister. The cause was tried before the Hon. WILLIAM F. ALLEN, one of the justices of this court, at the Tompkins circuit, in April, 1849. After the cause was opened by the counsel for the plaintiff, the counsel for the defendant moved the court to nonsuit the plaintiff, on the ground that the pleadings and the facts which stood admitted therein, did not entitle the plaintiff to recover. The court denied the motion and the defendant excepted. On the trial the plaintiff proved that the defendant agreed with him, that he would go and attend the sale, and bid off the premises, and take a deed in his own name, and give the plaintiff an opportunity to pay him the amount of his bid, and have the premises; and that the defendant agreed that the plaintiff should have two weeks' notice to pay the amount. After the evidence had closed, the counsel for the defendant moved the court to nonsuit the plaintiff, on the ground that the proof did not sustain the complaint, and he also presented the same questions again to the court, that were raised on the opening of the cause. The court decided that the cause should go to the jury, and the defendant excepted. The jury found a verdict for the plaintiff, for the sum of \$350,68 damages; and the defendant appealed to the general term.

Ferris & Cushing, for the plaintiff.

J. M. Parker, for the defendant.

By the Court, MASON, J. I am satisfied, after a careful examination of this case, that we can not permit this judgment to stand. The agreement set forth in the complaint, and proved upon the trial, is most clearly within the statute of frauds, and consequently void. The complaint is framed upon the assump-

Lathrop v. Hoyt.

tion that here was a trust created ; that the defendant became and was the trustee of the plaintiff in regard to this land, and as such is bound to account to the plaintiff and pay over. If there is a liability on the part of the defendant, it is because there is a resulting trust in favor of the plaintiff. The plaintiff sought, both in his complaint and evidence, to make out a resulting trust in his favor ; but in my opinion, has utterly failed. The doctrine is a familiar one, that if A. purchase land with his own money, and a deed is taken in the name of B., a trust results by operation of law in favor of A. ; and the fact that the purchase was made with the money of A., on which the resulting trust is to arise, may be proved by parol. (*Boyd v. McClean*, 1 John. Ch. Rep. 582. 2 Story's Eq. Jur. p. 609, § 1201.) And in such a case, parol evidence is admissible against the face of the deed itself, and also in opposition to the answer of the trustee, denying the trust. (*Boyd v. McClean, supra.*) The plaintiff sought to bring his case within this rule, by setting forth in his complaint that the defendant agreed to loan the money to the plaintiff, which he was to pay for the land ; but he has failed to show such a case, in his proof. The agreement, as proved, was simply this : The defendant agreed with the plaintiff, that he would go and attend the sale, and bid off the premises, and take a deed in his own name, and give the plaintiff an opportunity to pay him the amount of his bid, and have the premises, and the defendant agreed that the plaintiff should have two weeks' notice to pay the amount. This presents a case most clearly within the statute of frauds. Story says, "Where a man employs another, by parol, as an agent to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase money is paid by the principal ; then if the agent denies the trust, and there is no written agreement or document establishing it, he can not, by a suit in equity, compel the agent to convey the estate to him, for that would be decidedly in the teeth of the statute of frauds." (2 Story's Eq. Jur. p. 611, § 1201, a.) Lord Keeper Henly affirmed this doctrine in the case of *Partlett v. Rickersgill*, (see 4 East's Rep. 577, note.) And he held that in such

Lathrop v. Hoyt.

a case, parol evidence could not be given against the deed, and the defendant's answer denying the trust, for the reason that the case was within the statute of frauds. This same doctrine was affirmed in its broadest extent, by Chancellor Kent, in the case of *Botsford v. Burr*, (2 *John. Ch. Rep.* 406.) He says that "the whole foundation of the trust is the payment of the money, and that must be clearly proved." He adds, "If therefore, the party who sets up the resulting trust made no payment, he can not be permitted to show by parol proof that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds." The same doctrine is recognized in the supreme court, in the cases of *Hall v. Smith*, (4 *John.* 240,) and *Sherill et al. v. Crosby*, (14 *Id.* 358.)

There is a wide distinction between the case of a resulting trust where the party has paid the purchase money, and the deed is given to the defendant, and the case under consideration. In the former case, the trust results by operation of law from the payment of the money and the giving of the deed, and requires no agreement of the parties to create it. Not so the case made by the plaintiff in his evidence. Here the trust results from the agreement between the parties. The plaintiff agreed with the defendant, that he should go to this sale, and bid in these premises for him, if you please, and take a deed in his own name, and give the defendant time to pay him the amount of his bid, and then the defendant agreed he might have the title. Such a case is most clearly within the spirit of the statute, and falls within its very words. The statute is as follows: "No estate or interest in lands, other than leases for a term not exceeding one year, *nor any trust* or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (2 *R. S.* 135, § 6.) The plaintiff's case is not aided by calling this an agreement to allow the plaintiff to redeem the land, and that the defendant should reconvey upon

Clarke *v.* Baird.

redemption; for it is then plainly a case within the statute of frauds. (2 R. S. 135, §§ 6, 8. 4 John. 240. 5 Cowen, 192.) The transaction can not be considered a mortgage between the parties; for the plaintiff's interest was all divested by the sale, and he had no interest in the premises, to mortgage. I am not able to view this case in any aspect that will help the plaintiff out of the difficulty which the statute of frauds has thrown around it, and I can only say that I should have been very glad to discover some way through which we might let him escape with the verdict which he has obtained; for there is great equity in his case, and were it not for the stubborn barrier which the statute of frauds has interposed, we should feel disposed to make the defendant account for what he unjustly withholds from the plaintiff, if the facts which the plaintiff has established in this case are to be regarded as the evidence of the transaction between these parties. The statute, however, has written its sentence upon this agreement between these parties, and the plaintiff therefore can claim nothing from his agreement.

The judgment must be reversed, and a new trial granted, for the errors of the judge in not nonsuiting the plaintiff at the close of the proofs; and as the plaintiff may perhaps show a case which will entitle him to recover, a new trial is granted.

New trial granted.

SAME TERM. *Before the same Justices.*

CLARKE *vs.* BAIRD.

An action can not be maintained by a purchaser, against the vendor, to recover damages for fraud upon a sale of land, in making a false representation as to one of the boundaries, if, at the time of the purchase, the plaintiff had the means of ascertaining the true line, and neglected to inform himself

Clarke v. Baird.

If a purchaser possesses the means of informing himself as to the character and situation of the land, and omits to use them, the rule of *cautus emptor* should be held to apply to him.

In an action by a purchaser, against the vendor, for fraud, in misrepresenting the boundaries of the land, a notice previously served by the purchaser upon a claimant of a portion of the land, under the statute concerning proceedings to compel the determination of claims to land, (2 R. S. 312,) will be evidence against the plaintiff, to show what land he then claimed a right to hold, under his conveyance.

In such a suit, the judgment record in an action of ejectment brought against the purchaser, by a third person, will not be evidence, upon the question of title between the vendor and purchaser.

THIS was an action to recover damages for fraud upon the sale of a tavern stand and premises, on the 4th of March, 1840, situated in the town of Oxford, in the county of Chenango. The cause of action principally relied on was for stating that the premises were bounded on the southerly or south-westerly side by a certain mill race; whereas, it was charged and alledged, the same did not extend to the mill race, and that the defendant well knew the same. The plaintiff, after he purchased the premises of the defendant, and went into possession, found that the Messrs. Lewis, who owned the adjoining lands, alledged that the plaintiff's land did not extend to the mill race, but they claimed that their land extended over and across the mill race, and embraced a strip upon that side of the mill race, bounding the premises of the plaintiff; thereby cutting off the plaintiff from the water of the mill race. The plaintiff thereupon served a notice upon the Lewises, under the statute, requiring them to appear in the supreme court and assert their claim to the premises in the manner provided by law. (2 R. S. 313, §§ 1, 2, 3, 4, &c.) The Lewises then brought an action of ejectment, against the plaintiff in this suit, and recovered the said strip of land. The notice which the plaintiff served upon the Lewises contained a description of the premises which the plaintiff claimed under his deed from Baird, and that said premises then were, and for three years had been, in the actual possession of the plaintiff, or of those from whom he derived title. The notice fully conformed to the second section of the statute. Upon the trial of this cause the plaintiff introduced in evidence

Clarke *v.* Baird.

the record of the judgment in the ejectment suit brought by the Lewises against him, for the purpose of showing that the premises were not in fact bounded by the race. The defendant objected to this evidence, and excepted to the ruling of the court. The notice which the plaintiff served upon the Lewises was given in evidence upon the trial of the cause. It is not necessary to make a further statement of the facts, as the points will sufficiently appear in the opinion of the court. The case was tried before Justice Morehouse, at the Chenango circuit, in August, 1848.

McKoon & Packer, for the plaintiff.

H. R. Mygatt, for the defendant.

By the Court, MASON, J. There was much evidence given upon the trial of this cause, and the defendant's counsel, after the evidence was closed, requested the court to charge the jury "*that if the plaintiff had the means of ascertaining the true line, and neglected so to inform himself, the action can not be sustained.*" The court refused so to charge, and charged the jury that the contrary thereof was true, and the defendant's counsel excepted. I think the judge fell into an error here. I know that the writers on the moral law hold it to be the duty of the vendor to disclose all defects which are within his knowledge. (*Paley's Moral Philosophy*, b. 3, ch. 7. *Grotius*, b. 2, ch. 12, § 9. 2 *Kent*, 484.) The common law, however, is not quite so strict. (*Id.*) Chancellor Kent says, "the common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against the consequences of indolence and folly, or careless indifference to the ordinary and accessible means of information." He adds, "If the purchaser be wanting of attention to these points where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply." This rule seems to have been applied with even greater strictness on the sale of real estate than personal prop-

Clarke *v.* Baird.

erty. I understand the court to go no farther in the case of *Sandford v. Handy*, (23 *Wend.* 260,) than to hold that a vendor of land is liable for a false representation as to its location, if the purchaser have not an opportunity, at the time, of seeing the premises ; and such is the case as reported. And the same is true of the case of *Van Epps v. Harrison*, (5 *Hill*, 63.) In the latter case the purchaser had not the opportunity to see the lands. The court in that case seemed to doubt the propriety of extending these actions for fraud on the sale of real estate. Bronson, Justice, in giving the opinion of the court, says : "I am not entirely without apprehension that some bad consequences may result from giving an action against the vendor for misrepresentation concerning the quality and condition of the land he sells." He adds, "common prudence requires the vendee should ascertain the truth of such assertions, before he acts."

In the still later case of *Davis v. Sims and Bates*, (in *MS.*) in which case Chief Justice Nelson delivered the opinion of the court, in an action on the case for fraud in the sale of a farm, and where the purchase was made in the winter season, and the purchaser had been upon the farm while it was covered with snow, the chief justice, in the conclusion of his opinion, says, "independently of this ground, we apprehend it would be very difficult for the plaintiff to make out a cause of action, in a case where, if he had not the same opportunity as the defendants to obtain a knowledge of the character and condition of the farm, he had at least in his power all the means necessary to acquire such knowledge ; and if he failed, the failure is as much attributable to his own neglect and want of ordinary prudence, as to their representations." He adds, "in such a case the rule *caveat emptor* emphatically applies." The case of *Davis v. Sims and Bates* was considered by this court in the recent case of *Harrington v. Norton*, in which I delivered the opinion, and the principles of the case adopted. In speaking of the case of *Davis v. Sims and Bates*, on that occasion, I used the following language, which I have found no occasion since to retract : "This I doubt not is the salutary rule when applied to the case

Clarke v. Baird.

of a sale of real estate; and where the purchaser has the opportunity to examine the premises, the rule of *caveat emptor* should be enforced with great strictness." We held the defendant liable in the case of *Harrington v. Norton*, which was an action for fraud in the sale of land, upon the sole ground that the plaintiff did not possess the necessary means, with even due diligence, to inform himself in relation to the matters for which the action was brought. And we laid down the rule distinctly, in this latter case, that if the plaintiff possessed the means at hand of informing himself, and did not use them, the rule of *caveat emptor* should be held to apply to him. Applying the principles of these cases to the charge of the judge in this case, I do not see how it is possible to sustain it. He did not charge as requested, but charged that the converse of the proposition was true. The charge then will read as follows, to wit: "that if the plaintiff had the means of ascertaining the true line, and neglected to inform himself, the action can still be sustained." I am not prepared to assent to this, as a general proposition of instruction to a jury.

I do not mean to say that there may not be cases where, although the plaintiff might possess the means to inform himself, still he might recover, notwithstanding. But such a case can not occur where he has been negligent in ascertaining the truth, or where by common and ordinary diligence he must have possessed himself of the truth. I understand this proposition to present a case where the plaintiff had the means of ascertaining the truth, and was guilty of neglect in not informing himself. The language of the proposition is that he had the means, *and neglected to inform himself*. I understand this request to be nothing more nor less than asking for the general proposition of law in such cases. That the rule of *caveat emptor* shall be strictly applied to the plaintiff, and if he have the means at command and is negligent in the use of them, that he shall be deprived of his action, at any rate. I am satisfied the proposition of the judge, in the broad terms in which he stated it to the jury, was well calculated to mislead, and can not be sustained, either upon authority or principle. The counsel for the

Clarke v. Baird.

defendant requested the court to charge the jury that the plaintiff was bound by the line as stated by him in his notice to the Lewises, requesting a trial of the title, which line is there stated "as fenced when plaintiff came into possession." The learned justice stated to the jury that he declined to adopt this proposition, and then charged that "*the notice was evidence of the extent that Baird gave him possession.*" If the counsel in this request desired the justice to charge that the plaintiff was estopped by this notice from setting up any other line than the one claimed in it, then the court was right in refusing to charge in the language of the proposition. If, however, the meaning and fair construction of the proposition imports nothing more than that the notice is binding upon the plaintiff as a broad admission of his, by way of evidence, then the court should have charged that such proposition was the law of the case.

There can be no doubt, I think, but that this written notice is to be taken as something more than an admission of what land the defendant put the plaintiff in possession of. I regard it as an admission of the plaintiff of what land he claimed he was entitled to hold under his deed from the defendant. Or in other words, I think it to be a strong admission in writing by the plaintiff that he did not consider that he was entitled to hold under his deed any further than where the old fence was when he went into possession. The judge held it to be evidence of the extent that Baird gave him possession. I think he did not go far enough here. It seems to me that the notice must be considered evidence to the extent we have stated above. I am of opinion, therefore, whatever may be said of the proposition, that the judge did not give full force and effect to this evidence in his charge.

But again; the justice, upon the trial, most certainly erred in admitting the judgment record in the ejectment suit of the Lewises against Clarke, to show the boundary of the tavern stand lot. That record was no evidence upon the question of title, between the parties to this suit. The action of ejectment was formerly a mere possessory action and concluded no one, either as to title or possession. Even the party against whom

Chapman *v.* Fuller.

the judgment was recovered might bring a new action, and again contest for the possession. By the revised statutes, however, a judgment in an action of ejectment, upon a verdict, concludes the parties to the action, and all persons claiming under them by a title accruing after the commencement of the action. (2 R. S. 309, § 36. *Ainslie v. The Mayor, &c. of New-York, 1 Barb. S. C. R. 169.*) This record is no evidence, therefore, upon this question of title between the parties to this suit, and should not have been received. (1 Barb. S. C. Rep. 169.) There are other questions in this case; but it is not necessary to consider them. There must be a new trial, costs to abide the event.

New trial granted.

ST. LAWRENCE GENERAL TERM, September, 1849. *Paige, Willard, and Hand, Justices.*

CHAPMAN *vs.* FULLER and WARK.

An execution, issued by a justice of the peace, may be renewed, on the last day it has to run, so as to retain the lien thereof upon property levied on by the constable, sufficient to satisfy the execution, and which he has on hand, for want of bidders.

A misdirection to the jury, in the charge of a justice of the peace, on a point of law material in the case, is error; and if it may have misled the jury, the common pleas should reverse the judgment.

ERROR to the late common pleas of Clinton county. Chapman sued Fuller and Wark before a justice in trespass *de bonis asportatis*, for a stove. The defendants pleaded the general issue, and gave notice that they would justify under a judgment and execution in favor of one Conant against Chapman, which was rendered for the purchase money of the stove. The judgment was recovered in a justice's court on the 27th day of

Chapman v. Fuller.

June, 1845, for over \$40, and the execution was issued thereon to Wark, a constable, on the 2d day of Oct. 1845. On the execution was indorsed, "Levied within on a threshing machine and fanning mill, and old cooking stove. The stove levied upon 19th Nov. 1845; 1 two year old heifer, 1 year old December 22d, 1845. The above advertised for sale at one o'clock in the afternoon of the 31st of December. The property on hand for want of bidders.

(Signed) N. WARK, Const."

Also as follows: "I hereby renew this ex'n at the request of the plff., to run 90 days, Dec. 31, 1845.

S. HUBBELL, Justice Peace."

Also as follows: "The two year old heifer claimed by Sewell for old Mrs. Chapman, and released from this execution. The stove sold 4th March 1846, to Wm. Bosworth, for \$14. The heifer sold to Francis Blane for 4 dollars, March 4, 1846.

(Signed) N. WARK, Constable."

Also "Rec'd from Wark on this ex'n 18 dollars."

There was proof tending to show that the defendants took down the stove in the plaintiff's house, where it was in use, and carried it away on the 4th of March 1846, and also that the constable did not offer it for sale during the first life of the execution; though some persons attended at the time the sale was advertised, to bid thereon. Also that the plaintiff bought the stove of Conant, the plaintiff in the execution, in November 1842, and that the judgment was for the purchase money. The cause was tried by a jury, who gave a verdict of \$25 for the plaintiff. Among other objections taken by the defendants was one to a portion of the charge of the justice to the jury, set forth in his return, as follows: "4th objection—I charged the jury that there was no law authorizing the renewal of an execution before it was out; that there was no levy indorsed on the execution after the renewal, and it was no justification to the officer having the renewal on the execution, if he obtained it by a false return; that the testimony was that there were bidders present at different times, to bid on the property, and that I charged the jury that these and all other matters in the

Chapman v. Fuller.

suit were for their consideration ; that they had heard the law and were judges of the law and the fact and would find accordingly." The defendants sued out a writ of certiorari and the court of common pleas reversed the judgment, and Chapman sued out a writ of error to reverse that judgment in this court.

J. C. Hubbell & L. Stetson, for the plaintiff in error.

G. M. Beckwith, for the defendants in error.

By the Court, HAND, J. It is not necessary, in the view I have taken of this cause, to discuss the point whether it was competent for the plaintiff in this action to show that the return of the constable, that the property was on hand for want of bidders, was false. (*The People v. Hopson*, 1 *Denio*, 579. *Glover v. Whittenhall*, 2 *Id.* 633. *Browning v. Hanford*, 7 *Hill*, 120. *Putnam v. Man*, 3 *Wend.* 202. *Townsend v. Olin*, 5 *Id.* 207. *Evans v. Parker*, 20 *Id.* 622. *Weeks v. Ellis*, 2 *Barb. S. C. Rep.* 320. *Cowen & Hill's Notes*, 1085, 1087, 8, 9, 1090.) The charge of the justice, that the execution could not be renewed on the last day it had to run was erroneous ; and as it may have misled the jury, the common pleas were right in reversing the judgment. A misdirection in the charge of the justice, on a point of law material in the case, has very properly been held to be error. (*Trustees of Penn Yan v. Thorne*, 6 *Hill*, 326.)

It has been held that an execution may be renewed without a return of *nulla bona* indorsed thereon. (*Wickham v. Miller*, 12 *John.* 320.) And this without any written return, and after return day, and repeatedly. (*Visger v. Ward*, 1 *Wend.* 551.) And in *The People v. Hopson*, (1 *Denio*, 574,) it was held that this could be done after a sufficient levy upon property during the first life of the execution. In that case the execution ran out on the 5th of the month, was renewed on the 7th, and a new levy made on the same day, upon the same property. It was also repeated in that case, that a mere levy is not satisfaction of a judgment, contrary to some earlier de-

Chapman v. Fuller.

cisions. (4 *Cowen*, 417. 7 *Id.* 13, 310, 315.) It has been said that a renewal is improper after sufficient levy. (*Cowen's Tr.* 1074.) But that objection is overruled by *The People v. Hopson*, (*supra*.) I find no decision directly upon the question whether there can be a renewal before the time which the execution has to run is fully elapsed. In the case before us, the renewal was on the 90th day, and the last the execution had to run. In *Cornell v. Cook*, (7 *Cowen*, 310,) and *Brown v. Cook*, (9 *John.* 361,) it was decided that the lien was lost by suffering the execution to expire without sale. If this be still the rule, it follows that unless the execution can be renewed before it wholly runs out, or simultaneously therewith, the lien is gone, although the property remains unsold for want of bidders, or because it was found too late to advertise and sell, or for any other cause, however vigilant the officer. This might give a junior levy or subsequent purchaser the preference, and should not be allowed, unless by some positive rule of law. The statute declares that "if any execution be not satisfied, it may from time to time be renewed by the justice issuing the same, by an indorsement thereon to that effect, signed by him, and dated when the same shall be made." And the renewal shall be deemed to renew the execution in full force in all respects for 90 or 30 days, according to the amount. (2 *R. S.* 251, § 145.) It is further provided that "a constable shall not levy upon, or sell, any property, or imprison a defendant upon any execution after the time limited therein for its return, unless such execution shall have been renewed." (2 *R. S.* 253, § 161.) These sections are perhaps more explicit than the acts of 1824, 1818, and 1813. (1 *R. L.* 393. *Act of 1824*, § 14, 18,) It was held in 1823, that after a return that the property was on hand for want of bidders, as between the officer and the party, the officer must proceed and sell, the first opportunity. (*Pixley v. Butts*, 2 *Cowen*, 421.) This was put on the ground of necessity, because after a levy on sufficient property, the execution could not be renewed. We have seen that this is a mistake. (*The People v. Hopson*, *supra*.) And the plain language of the statute prohibits the execution of the process after the return

Dolittle v. Eddy.

day, unless renewed. (§ 161.) An alias or *testatum fieri facias*, regularly, should be tested on the day the *fi. fa.* was returnable. (*Tidd's Pr.* 931.) When sufficient property is on hand for want of buyers, the renewal is in the nature of the writ of *venditioni exponas*, which does not issue to give authority to the sheriff to sell, but to compel him to do so. (7 *Bac. Abr.* 458. *Clark v. Withers*, 6 *Mod.* 298.) It is considered a branch of the *fi. fa.* and not a distinct process. (*Hugh v. Rees*, 4 *M. & W.* 468.) No doubt if the property seized turns out to be insufficient, the renewal would authorize a further levy for the deficiency. The question is not on the power to renew where sufficient property has been levied upon and the delay has been with the consent of the plaintiff and without that of the defendant. That question does not arise here; for there is no proof that the plaintiff interfered to delay the execution of the process during the first life. The question here is, whether an execution may be renewed on the last day, so as to retain the lien. I have no doubt it may, and perhaps this is the only mode of saving the rights of the plaintiff. Both sections of the statute above referred to, seem to favor this construction, and to me it appears both legal and just.

The judgment of the court of common pleas must be affirmed.

Judgment affirmed.

SAME TERM. *Before the same Justices.*

DOLITTLE vs. EDDY.

A witness can not be allowed to give his opinion as to the amount of damages sustained by a party, in consequence of a mill lying still. But if, in answer to a question as to his opinion, the witness only states facts, error will not lie. An executory contract for the sale and purchase of land, giving to the purchaser

Dolittle *v.* Eddy.

a right to enter and possess the premises until default in the payment of the purchase money, without any time being fixed, and without any reservation of rent, is as respects the possession, but a *license* and not a *lease*.

It is not a permanent interest in the land; nor is it an estate; nor does the relation of landlord and tenant exist.

Such license operates as an excuse for the vendee's possession, and he can not be treated as a wrongdoer, until default; at least not without a demand of possession.

Under an executory contract of sale, authorizing the purchaser to enter into possession, and reserving to the vendor the right to re-enter on the non-payment of either installment of the purchase money, the vendor, upon a default, may re-enter and thereby revoke or countermand the license.

A mere license does not draw the title in question, within the statute in relation to the jurisdiction of justices of the peace.

ERROR to the late Clinton common pleas. Eddy sued Dolittle in a justice's court, in trespass, alledging that he was in possession of a sawmill, and that the defendant entered and forbid the plaintiff's sawyers working in the mill, by which he was turned out of the use of the mill. The defendant pleaded the general issue, and that the mill was contracted to be sold to one John McMartin by the defendant, with authority to the defendant to re-enter in case of default in making the payments; and that he entered for that cause. The plaintiff replied, denying the defendant's right of possession, under any contract. Judgment was given for the plaintiff, by the justice, and Dolittle appealed to the common pleas, where the plaintiff Eddy, again succeeded, and Dolittle brought a writ of error to this court. On the trial in the common pleas, a contract to convey the mill, given by Dolittle to one McMartin, was proved. The payments were to be made by installments, in lumber, delivered in the mill yard, and upon payment of the purchase money, according to the terms of the agreement, Dolittle was to execute a deed. The last clause of the contract ran thus: "and it is specially provided that in case the said John fails to make or fulfill any one installment, the said Lucus (the plaintiff) may re-enter and take possession at any time." The vendee took possession, and afterwards assigned the contract and delivered possession to Eddy. One of the installments not being paid, Dolittle demanded payment, upon which it was paid, all but be-

Dolittle *v.* Eddy.

tween 20 and 30 dollars, which not being paid, Dolittle's agent entered the mill and forbid Eddy's men sawing therein; upon which they left it. Various questions arose during the trial, and decisions were made, and exceptions taken, fairly presenting the points noticed in the opinion of the court.

F. A. Hubbell & G. M. Beckwith, for the plaintiff in error.

C. F. Tabor & G. A. Simmons, for the defendant in error.

By the Court, HAND, J. The question to the witness Springer, "what was the damage accruing to Mr. Eddy by the mill lying still a fortnight?" was improper. The witness, by well settled rules of evidence, could not be allowed to give his opinion in such a case. He could only give the facts. But as the witness, in his answer, only stated facts, error will not lie for that erroneous decision, because no harm was done by it.

Two questions arise on the merits of the case. Had the defendant a right to enter and take possession? And if he had, could he make this defense in a justice's court?

It is contended that the defendant could not enter and take possession, without a demand and a notice of such intention. That this is in the nature of a forfeiture, and after he had received a payment upon the installment after it was overdue, he must give reasonable notice of his intention to re-enter. That at least the plaintiff was tenant at will, and being so, the tenancy must be determined in the mode prescribed by the statute. It is unnecessary here to inquire what would be the effect, in equity, on a bill for specific performance, of the breach of the contract, by non-payment. In this case, the plaintiff sues in trespass; and he must maintain his action, if at all, upon his legal rights. Unless the defense was inadmissible, so that the error was harmless, the court were clearly wrong in saying to the jury that the 2d installment was so nearly paid up, that the contract was substantially fulfilled. A mere trifle might be disregarded as a mistake or waiver, under circumstances, but here was a clear deficiency remaining unpaid. The vendee, and

Dolittle v. Eddy.

those holding under him, had no right to fulfill in part and then insist that the vendor should remit the rest. This is not a case of forfeiture of an estate, but a question of possession or occupancy, while the contract remains executory.

This brings us to the question, what estate, or interest, or right had the plaintiff? It is said in some of the cases, that a vendee entering into possession under a contract to purchase, or an agreement to lease, is a tenant at will. In others in this state, he is said to be *quasi* tenant at will. (*Jackson v. Miller*, 7 *Cowen*, 747. *Jackson v. Moncrief*, 5 *Wend.* 29. *Cooper v. Stower*, 9 *John.* 331. *Wright v. Moore*, 21 *Wend.* 230.) But it is clear that here the vendee may be sued in ejectment without notice to quit. Certainly after default in fulfilling the contract, and that without a clause of re-entry. (*Jackson v. Miller*, 7 *Cowen*, 751. *Jackson v. Moncrief*, 5 *Wend.* 29. 4 *Kent*, 723.) The English rule is different. (*Right v. Beard*, 13 *East*, 210. *Doe dem. Newby v. Jackson*, 1 *B. & C.* 448.) But there the vendee is considered a tenant at will. (1 *Saund. Rep.* 276, *n. a. Am. ed.* 1846, and cases there cited. *And see Roe v. Street*, 2 *A. & E.* 329. *Doe ex dem. Jones v. Jones*, 10 *B. & C.* 718. *Doe dem. Nicholl v. McKaeg*, *Id.* 721. *Hegan v. Johnson*, 2 *Taunt.* 148. *Comyn, L. & T.* 291.) In this case there is no express consent that the vendee may enter and occupy. And a mere executory contract to purchase land will not confer a right to enter. (*Erwin v. Olmsted*, 7 *Cowen*, 229. *Suffern v. Townsend*, 9 *John.* 35.) But perhaps this is implied from the last clause of the agreement. "And it is specially provided that in case the said John fails to make or fulfill any one of the installments the said Lucas may re-enter or take possession at any time." And the payments were to be made in lumber delivered at the mill yard. Admitting, then, that here was permission to enter and occupy, the nature of that permission or license is important; for if it amounts to an interest in the land, properly so considered, the defendant must fail. For that is considered title, for the purposes of jurisdiction; and the defendant not having taken the proper steps in pleading, he can not interpose his right or claim of title on the trial, (2 *R. S.* 237, § 62,) nor can he do this in the

Dolittle v. Eddy.

common pleas, on an appeal. So it was decided under the former law ; and the rule seems reasonable. (*Dewey v. Bordwell*, 9 *Wend.* 65.) It is sometimes difficult to distinguish between an easement, a license, and a lease. A license is an authority or power given to a man to do a lawful act, without which, he could not do it, (*Co. Litt.* 52, b,) and is said to be personal, and can not be transferred, (2 *Lill. Ab.* 217, *citing* 12 *Hen.* 7, 25, 18 *Ed.* 414,) and is countermandable, unless there is a certain time. (*Popl.* 1, § 1.) Savage, C. J., in *Mumford v. Whitney*, (15 *Wend.* 380,) reviewed the authorities, and said, "A license is an authority to enter on the lands of another, and do a particular act or series of acts, without possessing any interest in the land. It is founded in personal confidence, is not assignable, and is valid though not in writing." And he adds: "A license to enter upon land does not purport to convey an interest in land ; it is substantially a promise without consideration." It differs from an easement, which is an interest in lands, and requires a writing within the statute of frauds. (*Fentiman v. Smith*, 4 *East*, 107. *Hewlins v. Shippam*, 5 *B. & C.* 229.) And is a service or convenience one hath on the land of another, without profit. (3 *Cruise*, 530. *Bayley, J. in Hewlins v. Shippam, supra.*) A lease is a contract for the possession and profits of lands and tenements on one side, and a recompence of rent or other compensation on the other. (4 *Cruise*, 15. 1 *Hill. Abr.* 130.) A mere license to occupy, use, or take the profits of land, is in the nature of a lease. This, however, seems to pass no estate. Though it is said a license to occupy for a certain time, is a lease. (15 *Viner*, 92. *Hobart, C. J. in Tisdale v. Essex, Hob.* 35, and see 3 *Kent.* 452.) It seems a beneficial license, to be exercised on land, may be given without writing. (*Tayler v. Waters*, 7 *Taunt.* 374. *Webb v. Pater-noster, Palm.* 71. *Wood v. Lake, Say*, 3. *Leggins v. Inge*, 7 *Bing.* 682. *Cook v. Stearns*, 11 *Mass.* 533.) But in such case, it is perhaps a mere excuse. (*Prince v. Case*, 10 *Conn. Rep.* 375. *Kent v. Kent*, 18 *Pick.* 569.) And the English cases above cited in support of the rule to the extent they were carried, have been doubted. (1 *Sugd. on Vend.* 138. *But see*

Dolittle v. Eddy.

Mumford v. Whitney, 15 *Wend.* 380; *Whitmarsh v. Walker*, 1 *Metc.* 313; *Jackson v. Babcock*, 4 *John.* 418; *Thompson v. Gregory*, 4 *Id.* 81. *Jackson v. Buel*, 9 *Id.* 298.)

I think the result of the cases in this state is, that as to the possession, an executory contract for the purchase of land, giving to the purchaser a right to enter and possess until default in the payment of the purchase money, without any fixed period and without any compensation being made for the use, is but a license and not a lease. It is clear that it is not an easement within the definition of that term. It is not a permanent interest in the land, nor is it an estate. (3 *Kent*, 452.) The relation of landlord and tenant in no sense exists between vendor and vendee. (*Watkins v. Holman*, 16 *Pet. Rep.* 54, *McLean, J.*) It wants an essential quality of a lease; a stipulation for compensation to the owner. Though in England, as we have seen, one who enters under an agreement for a lease, or to purchase, is a tenant at will, unless he pays or agrees to pay rent or compensation for the use. (1 *Saund. Rep.* 276 *n. a. Am. ed.* 1846, and cases there cited. 2 *Smith's Leading Cases*, 76, and cases there cited. And see *Rex v. Collett, Russ. & R. C. C.* 498; *Doe v. Rock*, 1 *Carr. and Marshman*, 549.) But our courts, at least for the purposes of entry, have not so considered it; and in several cases have denominated it a license. (*Suffern v. Townsend*, 9 *John.* 35. *Cooper v. Stover*, *Id.* 331. *Erwin v. Olmsted*, 7 *Cowen*, 229. *Mooers v. Wait*, 3 *Wend.* 104. *Wright v. Moore*, 21 *Id.* 230.) "Taken in its strict import, it is a mere license." (*Coben, J. in Wright v. Moore, supra.*) Such license operates as an excuse for his possession, and he can not be treated as a wrongdoer until default, at least not without a demand of possession. A mere license does not draw the title in question, within the statute in relation to the jurisdiction of justices. (2 *R. S.* 226 § 4. *Wickham v. Seelye*, 18 *Wend.* 650. *Chandler v. Duane*, 10 *Id.* 563. *Ex parte Coburn*, 1 *Cowen*, 568.)

If the defendant can show a license, I think he may show a revocation of a license. Certainly if the defendant sets up a license, the plaintiff can show it countermanded, determined,

Boyce *v.* Brown.

or revoked. And title is no more in question by one party showing this, than the other.

It was admitted that Eddy had no greater rights than Mc-Martin, the original vendee. And it follows, that Dolittle, under the circumstances of this case, could treat the license as countermanded. That gave him a right to re-enter. (*Hyatt v. Wood*, 4 *John.* 150.) Even a landlord has a right to re-enter upon a tenant at will, though he must determine the tenancy before he can bring ejectment. The plaintiff then had a mere license to occupy if he paid the purchase money. He did not pay, and the defendant entered, thereby revoking or countermanding the license. Title was not in question. It was simply a question of payment, and the license stood or fell with that question.

There must be a *venire de novo* in the Clinton county court.

Judgment reversed.

7 80
86 308

SAME TERM. *Before the same Justices.*

BOYCE *vs.* BROWN.

Requisites of an answer, under the Code of 1848.

Although the forms of pleading previously in use are not now applicable, particularly as to the classification of actions, yet the manner of stating the claim or defense, as required by the code, with that exception, and that of certain formal parts, still remains. The pleader may use his own language; but the pleading must contain the necessary matter, and it must be stated in an intelligible, issuable form, capable of trial. *Per HAND, J.*

Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts; nor arguments; nor inferences; nor matter of law only. *Per HAND, J.*

Nor should pleadings be hypothetical; nor in the alternative; nor destitute of truth and certainty. *Per HAND, J.*

Section 129 of the code of 1848 (corresponding with § 150 of the amended code,) is a statutory inhibition against duplicity, in stating two defenses together. Each defense, or ground of defense, must be separately stated. And this, #

Boyce v. Brown.

seems, applies to more than one defense to the same cause of action, as well as to different defenses to different causes of action.

As a general rule, a pleading, to be good by the settled principles of pleading as modified by the code, must state the facts constituting a legal cause of action, or ground of defense. And these should be set forth in a plain, direct, definite, certain, and traversable manner, and according to their legal effect.

Any number of facts constituting one cause of action, or one defense, may be combined; but each cause of action, and each defense, should be stated separately, so as to be capable of trial.

Method of pleading a right of way.

A party having a private way, cannot justify going *extra viam*, because the road is impassable.

A plaintiff, by going to trial upon the answer of the defendant, admits it to be true, so far as the matter is set out issuably. But that admission does not aid a defect of substance, or prevent the plaintiff from taking advantage of it upon the trial.

If a good title be defectively set out, *it seems* the plaintiff can not, under the 204th section of the code, make the objection on the trial. But where the title itself, as set out, is defective, or where in truth none is set out, the case is different.

APPEAL, by the defendant, from the judgment rendered by the judge at the circuit, upon the issues of law arising upon the pleadings. The complaint alledged that on the 26th of May, 1848, the defendant, wrongfully and without leave, entered upon the lands in the possession of the plaintiff, with his horses and wagons, and trod down, ate up and destroyed the grass and herbage and crops there growing; and that he wrongfully broke, carried away, and destroyed the gates, bars and fences, potatoes, corn and wood of the plaintiff; that he wrongfully opened the gates and bars to the plaintiff's enclosure, whereby hogs, geese, cattle and horses got into such enclosure and destroyed his grass and crops, &c. &c.; claiming judgment for \$20. The defendant, in his answer, denied the several acts and things alledged in the complaint, or doing any act or thing on any lands of the plaintiff, or in his possession, except in passing from the main road (leading to Hartford,) by or from the house on the farm, then or formerly owned by Jonathan Brown, and then occupied by the plaintiff, to the dwelling house of the defendant, occupied by him. That as to the defendant's passing over lands in the plaintiff's possession and over the said path or road leading from the house occupied by the plaintiff, to

Boyce v. Brown.

the defendant's house, being a path or road used for many years as a road, he, the defendant, did pass over and travel the same, as he lawfully might do. That if he took down any bars or gates, or did any of the other acts or things alledged against him, it was because the same obstructed his passage, and were wrongfully put and placed there by the plaintiff, and were necessary to be removed in order to enable the defendant to pass through and go over the same. That the said road was at the said time and times a public highway by user under the statute, or if not a public highway was a private way or road, and that the defendant had, at the said time and times, a right of way across the said land and in the road in question ; he and others before him having used the said road or passage, as and for a road or highway, for upwards of thirty years, for themselves, their teams, horses, cattle, &c. That the defendant and those before him, and others, had the peaceable use of said road, as a road or way, for upwards of thirty years, and that too by the *license, consent and permission* of Jonathan Brown, the owner of said land and farm. That the plaintiff purchased his farm on which his said dwelling house stood, of the said Jonathan Brown, and the road or passage in question was at the said time used as a road or highway, and the said Jonathan Brown at the time when the said defendant built and erected his said dwelling house, agreed with the defendant, in consideration that he the said defendant would build and erect his said house, at the place and where he did erect it, that he the said defendant should and might always and forever have and use, and have the right to use and occupy the said road or passage aforesaid, leading by or from the said house, on the said Jonathan Brown's farm, to the said dwelling house of the plaintiff as the same was then and had since been used, as and for a road or highway ; and that the defendant might and should travel and enjoy the same for that purpose. And the defendant alledged that he did enter upon, and pass over said road, leading across said farm, using the same as a road or way, for himself, friends, family and teams, as he lawfully might. And he denied entering upon the plaintiff's premises, or premises in his possession, except in pass-

Boyce v. Brown.

ing over said road ; and alledged that if he ever turned aside or turned out of said road or path, it was because the same was unlawfully and wrongfully obstructed or rendered impassable at the particular place, by the plaintiff or others, so that he could not otherwise pass along, and therefore he turned aside to avoid the obstructions, and he removed the obstructions as he lawfully might, and in order to pass. He denied that he ever left the gates or bars down wrongfully or unnecessarily, as alledged in the complaint ; that if he ever did so, it was because the plaintiff, by his act (or the act of others) had so chained or fastened up, or fixed the same, that the defendant could not put or fix up the same, or because he found the same open ; that if any potatoes or corn or other crops were injured, it was because the plaintiff had wrongfully and knowingly put the same in the road in question, where the defendant had a right to travel. And the defendant denied any and all matters, things and acts and damages alledged in the complaint, except the passing over the road in question, and denied that any damage was sustained by means thereof, as alledged in the complaint. And he claimed that said road over which he passed was a public highway, or at all events a private way or road, and that the defendant had a right of way, or an easement, in and over the same, by prescription, by agreement, and by actual user of himself and others for over 20 years, and from necessity. That the plaintiff was a mere tenant of said premises. As to any act or thing, or alledged trespass, if any, prior to the time alledged in the complaint, the defendant alledged that there had been a former trial and judgment for the defendant upon the same, before Silas Hall, Esq. justice of the peace, in a suit brought by the plaintiff against the defendant. He denied that any damage was done by cattle or beasts, as alledged in the complaint, and alledged that he had at the several times a right to travel and pass over said land and road ; that the plaintiff, when he entered upon and took possession of said farm, did so with knowledge of the right of the defendant to pass over and travel the same, and subject thereto ; that if the defendant entered on any land in the plaintiff's possession other than in passing over said

Boyce *v.* Brown.

road, which however he denied doing, it was upon lawful business with the express or implied license and permission of the plaintiff.

The judge, at the circuit, ordered judgment to be given for the plaintiff, for the insufficiency of the answer; with leave to the defendant to withdraw his answer and substitute a new one, on payment of costs.

J. C. Hopkins, for the plaintiff.

O. F. Thompson, for the defendant.

By the Court, HAND, J. The answer admits an entry upon the land of the plaintiff, and sets up matter in justification; and the important question is, does it in substance contain a justification? It was put in before the code was amended. The code then required that the answer should contain, "In respect to each allegation of the complaint controverted by the defendant a specific denial thereof, or of any knowledge thereof, sufficient to form a belief. 2d. A statement of any new matter constituting a defense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what was intended." And the different grounds of defense were to be stated separately. (*Code*, §§ 128, 9.) The 118th section abolished all the *forms* of pleading theretofore existing, but did not abolish the fundamental principles by which legal controversies had been conducted. That perhaps was impossible, without changing or interfering with the rights of parties.

An eminent writer says that "pleading is a statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense. It is the formal mode of alledging that on the record, which would be the support or the defense of the party, in evidence." (1 *Chit. on Pl.* 195.) This definition is as true now in relation to substance, as before the code. The forms before in use are not now in some respect "legal forms," particularly as to the classifi-

Boyce v. Brown.

cation of actions ; but the manner of stating the claim or defense, as required by the code, with this exception, and that of certain formal parts, still remains ; and in other respects I have not been able to discover that any great change has been made in the substance of pleading. The pleader may use his own language, but the necessary matter must be there, and be stated in an intelligible and issuable form, capable of trial. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments nor inferences, nor matter of law only. (*Gould on Plead.* 14, 53. 1 *Chit. Pl.* 196. *Dyett v. Pendleton*, 8 *Cowen*, 792, *Spencer, senator*. *Grannis v. Clark*, 8 *Id.* 36. *Kearny v. King*, 1 *Chit. Rep.* 28. *Church v. Gilman*, 15 *Wend.* 656. 2 *Saund.* 9, *b. n. z.* 3 *B. & A.* 66.) Nor should pleadings be hypothetical. (*Gould v. Lasbury*, 4 *Tyr.* 863. 1 *B. & P.* 413. 3 *M. & Sel.* 114. *Steph. Pl.* 430, 1.) Nor in the alternative. (*Cook v Cox*, 3 *M. & Sel.* 110, 114. 1 *B. & P.* 413. 1 *Chit. Pl.* 217. *Tift v. Tift*, 4 *Denio*, 175.) In this case the title or right (if any) is set up in the alternative form ; and again the defendant says, that *if* he did go *extra viam*, it was because the way was obstructed. Good pleading should be material, single, true, unambiguous, consistent, and certain to a common intent as to time, place, person and quantity, and not redundant or argumentative. I do not say that under the code a failure in these particulars would be fatal. The pleadings are to be liberally construed, with a view to substantial justice, and the court is to disregard errors and defects which do not affect the substantial rights of the party. (§§ 159, 176.) But these qualities were desirable in pleadings at law, formerly, and the same general principles governed pleadings in equity. Buller, J., in *Reed v. Brookman*, (3 *T. R.* 159,) says, "Pleading is the formal mode of alledging that on the record which would be the support or defense of the party in evidence ;" and Mr. Justice Story says, this rule is equally applicable to pleadings in equity as to pleadings at law. (*Story's Eq. Pl.* 3, *n.* *And see Lube's Eq. Pl. pt. 2, ch. 1, § 111.*) There should be some proper forms of proceeding, without which logical order and reasoning can not be

Boyce v. Brown.

preserved. The same eminent writer says: "It is obvious that in every system of jurisprudence professing to provide for the administration of justice, there must be some forms of proceeding adopted to bring the matters in controversy between the parties who are interested therein, before the tribunal by which they are to be adjudicated. (*Stor. Pl.* § 1.) When the law and the fact are decided by the judges, there is not the same necessity of separating them. In that case the judge selects the points in the pleadings to which the proofs are to be applied. But when this is done in the haste of a jury trial it is more difficult, and casts upon the court great power and responsibility, and this selection often takes the counsel by surprise. The judge has not only to select the issues to be tried, and perhaps out of voluminous pleadings, but to make the jury also possessed of them. It may be questionable whether, in the class of cases which will admit of it, that great and prominent characteristic system of our jurisprudence, trial by jury, will not have more freedom of action and be more complete in practice, by the use of simple and settled forms of issues, familiar to the profession, and to which juries can generally respond, yea or nay. However, intending to avoid all hindrance of justice by mere technicalities, our lawgivers have assimilated the pleadings in equity and at law; and endeavored to require a plain statement of facts for both; and it is the duty of the courts, as far as may be, to carry that change into effect, in good faith and in all its spirit. This must be done by liberal amendments and by disregarding every thing merely formal; but to disregard substance and all the plain common sense rules of pleading, will lead to doubt, surprise and confusion, open the door for chicanery, and utterly subvert, in effect, the trial by jury. All experience has shown that the trial by jury is best adapted to direct issues, script of extrinsic and unnecessary matters. These are best obtained by truth and certainty in pleading. Ld. C. J. Hobart said, more than two centuries since, that truth is the goodness and virtue of pleading, and certainty the beauty and grace of it. (*Slade v. Drake, Hob.* 295.) The paragraph from which this sentiment is extracted is at once concise and elegant. "Littleton

Boyce v. Brown.

says that the pleading is the honorable, commendable and profitable part of the law ; and by good desert it is so. For cases arise by chance and are many times intricate, confused and obscured, and are cast into form and made evident, clear and easy, both to judge and jury (which are the arbitrators of all causes) by good and fair pleading. So that this is the principal art of law, for pleading is not talking ; and therefore it is required that pleading be true ; that is the goodness and virtue of pleading ; and that it be certain and single, and that is the beauty and grace of pleading." When set forms are used, of which the nature, use and effect are known to all, although not literally of the precise meaning given to them, yet no embarrassment is felt in ascertaining the issue. But if all forms, as such, are to be thrown aside, the pleader must conform to certain settled principles by which good pleading is tested, for without such rules, doubt, uncertainty and perplexity, to say nothing of constant novelty and diversity, will tend to render the administration of justice at least tardy, precarious and irregular, if not capricious. In all pleading at common law, in whatever language, and whether *ore tenus* or written, except in case of well understood and familiar forms, we find truth and certainty have been insisted upon. The pleading before us wants these. Truth, because inconsistent with itself. Every lawyer knows the difference between a public and private way, and that if public, it is not private ; and also the distinction between a highway by statute, by grant, by prescription and of necessity. And it is uncertain, because in the form of disjunctive propositions, or negations, and in the alternative ; and also in part hypothetical.

As I understand section 129, (now 150, which is the same except in a few words,) it is a statutory inhibition against duplicity in stating two defenses together. Each defense (or ground of defense) must be separately stated. And this, I think, applies to more than one defense to the same cause of action, as well as to different defenses to different causes of action ; so that, under the code, as amended by the act of April 11, 1849, it may be doubtful whether, what was matter of form before, requiring a special demurrer, is not now matter of substance.

Boyce v. Brown.

But it is not important to consider that point in this case; nor whether, if duplicity alone does not now make the answer *insufficient* in substance, it can be demurred to at all; (§ 153;) for I think this answer radically defective in matter.

All that I mean to say now, is, that as a general rule, a pleading, to be good by the settled principles of pleading as modified by the code, must state the facts constituting a legal cause of action or ground of defense; and these should be set forth in a plain, direct, definite, certain and traversable manner, and according to their legal effect. Any number of facts constituting one cause of action or one defense, may be combined; but each cause of action, and each defense, should be stated separately, and then they will be capable of trial. (*Code*, §§ 142, 149, 150, 160, 176.) This answer does not conform to these rules.

It is said there are five kinds of private ways. By grant, (and reservation,) prescription, necessity, custom, and statutes. (*Woolrych on Ways*, 9.) I doubt whether any such right exists here by custom, which is a sort of prescription by all of a certain community or place. Here, except by proceedings under the statute, a right of way rests upon grant, prescription, necessity or reservation. A prescription supposes a grant before the time of legal memory. A way of necessity derives its origin from a grant and by operation of law. In pleading a way by prescription or grant, no doubt the particular grounds of the title must be set forth, and as a way of necessity is in truth nothing else but a way by grant, it must be pleaded in the same way; and, if its origin can not be any longer traced, must be claimed by grant or prescription and pleaded as such, or (in some cases) as a non-existing grant. (*Dutton v. Taylor*, 2 *Lutw.* 148.) And if there once existed unity of possession, some authors have supposed it must be claimed by way of grant. The better opinion now is that a way of necessity can not be pleaded in general terms. See most of the authorities collected in the notes to *Pomfret v. Ricroft*, (1 *Saund.* 323, 6th ed. 1846, *Phil.*) Indeed, it seems there is no general way of necessity, without specifying the manner whereby the land over which it is claimed, becomes charged with the burden. Such was the decision in

Boyce v. Brown.

Bullard v. Harrison, (4 M. & Sel. 387,) where Ld. Ellenborough approves of Sergeant Williams' note to *Pomfret v. Ricroft*, (*supra*.) These are matters of substance. How can the plaintiff prepare for trial on the naked affirmation that the defendant claims a right of way by grant, without stating any thing more? It is no better than for the defendant to answer by a single sentence, "I justify under a right of way." It would be almost impossible to try such vague allegations. All the precedents are opposed to such looseness and obscurity. (9 *Went. Pl.* 161. *Lill. Ent.* 426. 2 *Rich. Pr. C. P.* 49. 3 *Ch. Pl.* 1118, 1127.) It is not even stated that the defendant could not have gone upon his own land, or that there was no other way. (*Bullard v. Harrison*, 4 M. & Sel. 392. *Reynolds v. Edwards, Willes*, 287. *Holmes v. Goring*, 2 *Bing.* 75. *Holmes v. Seely*, 19 *Wend.* 507.) In *Chichester v. Lethbridge*, (*Willes*, 71,) it was held that a public and a private way were inconsistent, and could not be claimed together; and that a prescription for a right of way for the plaintiff and *other persons*, without naming them, was bad after verdict.

The answer further alleges that if the defendant ever turned out of this road, it was because it was unlawfully obstructed and made impassable by the plaintiff or others. It now seems well settled that a party having a private way can not justify going *extra viam* because the road is impassable. (*Taylor v. Whitehead, Doug.* 749. *Bullard v. Harrison*, 4 M. & Sel. 387. *Woolrych on Ways*, 51. 3 *Kent*, 424. *Holmes v. Seely*, 19 *Wend.* 507. *Williams v. Safford*, *MS. decided in 4th district. See Post.*) Though perhaps this would be good in case of a way of necessity; particularly if the averment had been positive, that the disturbances were by the plaintiff or by his aid. (*Buller, J. in Taylor v. Whitehead, supra.* 3 *Kent*, 424. *Woolrych*, 51. *Holmes v. Seely, supra.* *Reynolds v. Edwards, Willes*, 282. *Osborne v. Wise*, 7 *C. & P.* 761. *Bullard v. Harrison, supra.*)

As to the allegation that "the defendant and those before him, and others," had the peaceable use of this road for more than thirty years by the "license, consent, and permission of

Boyce *v.* Brown.

Jonathan Brown," it is at most a mere license, and is so stated. Nothing is alledged showing that license to be irrevocable. (*Cocker v. Cowper*, 1 *Cr. Mees. & Roscoe*, 418. *Reynolds v. Edwards, Willes*, 282. *Mumford v. Whitney*, 15 *Wend.* 380. *Bird v. Higginson*, 4 *Nev. & M.* 505. *Webb v. Paternoster, Palm.* 71. 15 *Vin. Ab. License. F.* 11 *Ves.* 391. *Poph.* 151. 2 *Lill. Ab.* 215. *Prince v. Case*, 10 *Conn.* 375. *Jackson v. Babcock*, 4 *John.* 418. *Ex parte Coburn*, 1 *Conn.* 570.) Indeed it was still executory. A license is countermandable, though it concerns profit or pleasure, unless there be a certain time in the license. If a time is fixed, it is a lease. (15 *Vin. License, A. & E.*) This long user might, unless explained, (*Luce v. Carley*, 24 *Wend.* 651,) have sustained a plea of grant or prescriptive right. (*Corning v. Gould*, 16 *Id.* 531.) But it is not so pleaded.

The defendant further says that when he purchased of Jonathan Brown, this road then existed, and when the defendant built his dwelling house, Brown agreed that in consideration that the defendant would build there, he might forever use this road, and have the right to the use of it. It is not alledged that the defendant built his house in consideration thereof; or built it at all, except inferentially; but if it had been, as no grant is pretended, I think the principle laid down in *The Utica and Sch'y R. R. Co. v. Brinckerhoff*, (21 *Wend.* 139,) applies. There was no consideration or mutuality. And besides, as this is an easement, it should be claimed by grant or by prescriptive right, which supposes one. (3 *Kent*, 452. 15 *Wend.* 380, and cases there cited. *Dexter v. Hazen*, 10 *John.* 246. *Jackson v. Babcock*, 4 *Id.* 418.) Nor is there any allegation that the defendant was induced to lay out money to build the house, in consequence of such agreement.

The answer contains no defense to the action, and the next question is, can this be taken advantage of on the trial? The code, before it was amended, declared that an issue of law arises upon a demurrer to a complaint, or upon an allegation of fact in pleading by one party, the truth of which is not controverted by the other. (§ 204.) The plaintiff could not, it would seem,

Burhans v. Van Zandt.

(under the former code) demur, yet by going to trial upon this answer he admitted it to be true, so far as the matter is set out issuably. But that admission did not aid a defect in substance. If a good title be defectively set out, it is doubtful whether, under this section, the plaintiff could have made the objection on the trial. But the case is different where the title itself, as set out, is defective, or where in truth none is set out. Both of these objections apply to this case.

This answer was put in before the amendment of the code: it is therefore unnecessary to inquire whether the court, of its own motion, should have required the answer to be more definite and certain. (*Code*, § 160.)

The judgment rendered at circuit must be affirmed.

Judgment affirmed.

ALBANY GENERAL TERM, September, 1849. *Wright, Harris, and Watson*, Justices.

BURHANS and others vs. THOMAS K. VAN ZANDT and others.

It seems that the decisions of a referee upon matters of fact, in equity cases, should be treated as being, not, like the verdict of a jury, conclusive unless palpable error is manifest, but like the report of a master, or the decision of a vice chancellor, upon any matter referred, under the former practice; where, upon exceptions, or appeal, all questions decided were the subjects of review. *Per Harris. J.*

By the execution and delivery of a deed of land, the entire legal interest in the premises becomes vested in the grantee; and if the grantor continues in possession, afterwards, his possession is not that of an owner, but of a tenant of the grantee.

He will be regarded as holding the premises in subserviency to his grantee; and nothing short of an explicit disclaimer of such relation, and a notorious assertion of right in himself, will be sufficient to change the character of his possession, and render it adverse to the grantee.

But from the time when the grantor explicitly disclaims holding under the gran-

Burhans v. Van Zapdt,

tee, and openly asserts his title to the premises, in hostility to the title claimed under his own previous deed, his possession becomes adverse; even though he knows his title to be bad; and from that moment the statute of limitations will begin to operate.

A party in possession of land, claiming it as his own, under color of title in fee, is permitted to quiet such title by obtaining a conveyance of an adverse claim, without abandoning his previous claim of title.

But a person who acquired his possession in such a manner as to owe allegiance to the reversioners can not set up an outstanding title purchased in by him, to defeat their rights.

A possession acquired in subserviency to the title, of the reversioners, can not be defended, as against them, by asserting a new title subsequently acquired.

The general principle is, that one in possession may purchase in an outstanding title, for the purpose of strengthening his own. The only qualification of this rule is that his possession must not have been taken under circumstances which preclude him from disputing the title of the party claiming.

The qualification of the rule has its foundation in the law of estoppel, which will not allow a man to do what, in honesty and good conscience, he ought not to do. *Per HARRIS, J.*

But where a person enters under circumstances which constitute his possession, in its very inception, an adverse possession; and his claim is, from the beginning, hostile to that of persons claiming in remainder and reversion, and he enters, not in subordination to their right, but in defiance of it, there is nothing to impose upon him any obligation to protect the title of the remaindermen and reversioners, or to create a fiduciary relation between him and them.

If, therefore, while he is thus in possession, the premises are sold for the payment of an assessment, which is an incumbrance upon the premises, superior to the rights of either party, and the premises are bid off by a third person, the tenant in possession may purchase the same from him, and take a conveyance thereof, and thus acquire the title, for his own exclusive benefit.

A tenant for life, although bound to keep down the interest upon the incumbrances, out of the rents and profits, is not bound to extinguish the incumbrances themselves.

IN EQUITY. On the 14th of August, 1816, Thomas Van Zandt, being seised in fee of a block of ground in the city of Albany, bounded east by South Pearl-street, south by Beaver-street, west by Market-square, and north by the public market, executed a deed of trust, whereby, out of the great affection and love which he had for his sister Hannah Van Antwerp, wife of Daniel L. Van Antwerp, and Alida Van Antwerp, William V. Z. Van Antwerp, Henry Van Antwerp, Stephen Lush Van Antwerp, and Eliza Ann Van Antwerp, the children of his sister, and in consideration of such love and affection, as also for

Burhans v. Van Zandt.

the better providing for the maintenance of himself during his natural life, and after his death for the maintenance of the said Hannah Van Antwerp, during her natural life, and after both their deaths, for the better maintenance, support and livelihood of the said children, he granted and conveyed the premises to Daniel L. Van Antwerp, in trust to manage, superintend and govern according to the best of his knowledge and ability, so as to render the same as productive as possible, during the lifetime of the said Thomas Van Zandt, and to pay over the product thereof from time to time as received, to the grantor, and after his death to manage the same, in manner aforesaid, and pay the products thereof as received, to the said Hannah Van Antwerp during her lifetime, and immediately after the death of both the said Thomas Van Zandt and Hannah Van Antwerp, to convey the premises in fee by good and sufficient conveyances to the said children, or to such of them as should then be surviving, as tenants in common. The deed was duly acknowledged and recorded. The trustee did not take possession of the premises, but Thomas Van Zandt continued after the execution of the conveyance to receive the rents of the premises himself and to appropriate them to his own use.

In February, 1821, John Van Zandt, a brother of Thomas, commenced a suit against him in the Albany mayor's court upon an alledged indebtedness for board, and on the 8th of May following, a judgment was perfected by default, for \$1728.78. An execution was issued upon the judgment, to the sheriff of Albany, by virtue of which, on the 6th day of July, 1821, he sold the right, title and interest of Thomas Van Zandt, in the premises, to William J. Van Zandt, a son of the plaintiff in the execution, for \$1000. On the 15th of October, 1822, the sheriff executed a deed to the purchaser.

On the 20th of August, 1828, William J. Van Zandt filed his bill in the court of chancery against Daniel L. Van Antwerp and his wife, and their children, alledging that, by virtue of his sheriff's deed, he had acquired an absolute title, in fee simple, to the premises, and charging that the trust deed executed by Thomas Van Zandt to Daniel L. Van Antwerp was fraudulent.

Burhans v. Van Zandt.

and void, and a cloud upon his title, and praying that the same might be so declared, and he quieted in his possession. The defendants in that bill, in their answer, asserted that the trust deed was a valid conveyance, and insisted that the judgment, sale, and conveyance, under which the plaintiff claimed, were colorable, fraudulent, and void, as against them. Proofs having been taken in the cause, it was referred, for hearing and decision, to the vice chancellor of the fourth circuit ; and it having been argued upon the pleadings and proofs, a decree was made on the 21st day of October, 1833, dismissing the bill with costs. Daniel L. Van Antwerp died in 1832, and on the 30th of January, 1843, the court of chancery appointed the plaintiff, David Burhans, trustee in his place. Thomas Van Zandt died in April, 1842. On the 27th of November, 1834, Stephen L. Van Antwerp released and conveyed to William J. Van Zandt all his right, title and interest in the premises.

On the 5th of April, 1836, William J. Van Zandt, being at the time in possession, and receiving the rents, the premises were sold by the corporation of the city of Albany for the payment of an assessment for \$195,75 for widening Beaver-street. Robert Packard became the purchaser, for 1000 years. He received the usual declaration of sale from the corporation, and on the 20th day of July, 1838, conveyed his interest in the premises, by deed of assignment, endorsed upon the declaration of sale, to William J. Van Zandt.

The bill in this suit was filed in the court of chancery in January, 1845, by Mrs. Van Antwerp and her surviving children, except Stephen, who had released his interest to William J. Van Zandt, and the children of her deceased son William, together with the trustee, against William J. Van Zandt, for the purpose of having the declaration of sale to Packard, and the assignment to William J. Van Zandt, cancelled, and to compel him to surrender the possession of the premises to the trustee. The bill charged that when the suit was commenced upon which John Van Zandt recovered his judgment against Thomas Van Zandt, the latter was not indebted to the plaintiff in the suit, and that the suit originated and was prosecuted to judg-

Burhans v. Van Zandt.

ment by means of a fraudulent agreement and connivance between John Van Zandt and Thomas Van Zandt, for the purpose of defeating the rights of those claiming under the deed of trust ; that Thomas Van Zandt, being in the actual and direct receipt of the rent of the premises, and thus in possession by the permission of the trustee, had an interest or estate for life, as a *cestui que trust*, under the deed to Daniel L. Van Antwerp, to which, by virtue of the sheriff's sale, as it was procured and acquiesced in by Thomas Van Zandt, William J. Van Zandt acquired title, but that the sale, so far as it affected the interest of the plaintiffs, was fraudulent and void.

The bill further charged that William J. Van Zandt, being in the possession and enjoyment of the premises, as the purchaser of the life estate of Thomas Van Zandt therein, was bound in equity to protect the estates in remainder and in expectancy, depending on the termination of the life estate, to keep down any incumbrances existing on the premises, to pay off and satisfy all reasonable assessments and taxes thereon, and to save from sacrifice the several rights, interests, and estates of the plaintiffs ; that the sale to Packard, for the assessment, was fraudulently procured by William J. Van Zandt, for the purpose of cutting off the plaintiffs' rights ; and they insisted that it was a violation of his duty, and was fraudulent and void.

William J. Van Zandt put in his answer, without oath, in which he alledged that Thomas Van Zandt was weak and imbecile in intellect, very credulous and confiding in disposition, unstable in resolution, and easily to be imposed upon, very illiterate, and unaccustomed to, and unqualified for business ; and charged that the deed of trust was procured and obtained from him by deception and imposition, by misrepresenting its nature, contents, and effect, or other undue and unlawful influence or practices. The answer further alledged that Thomas Van Zandt, having been solicited by his sister and her husband to make a will, yielded to such solicitation, and they having undertaken to procure a will to be drawn, had the deed of trust prepared and exhibited to him as a will, and that he executed it under the belief that it was a will. The answer further sta-

Burbans v. Van Zandt.

ted that the defendant, immediately after receiving his deed from the sheriff, took possession of the premises, with the knowledge of the plaintiffs and Daniel L. Van Antwerp, and has held and claimed the same as owner in fee ever since; that he had, with their knowledge, made large and valuable improvements upon the premises; that he had also paid large assessments upon the premises, besides which he had paid "*over two hundred dollars for the repurchase and redemption of the premises sold on the assessment for widening Beaver-street, mentioned in the complainants' bill.*" The defendant also insisted that, after he had remained in the undisputed possession of the premises so long a time, the plaintiffs ought to be precluded from setting up the trust deed against his title, and he prayed the same benefit of these facts as if he had specially pleaded them in bar of the relief sought by the bill.

A replication to the answer having been filed, an order was made by this court in September, 1847, referring the cause to Orlando Meads, Esq. as a referee, to hear the proofs and allegations of the parties, and to determine the matters in controversy. The order provided that either party might bring the cause to a hearing upon the report of the referee, and a case to be settled in the manner provided in the order, or if no case should be made, then upon the report of the referee alone, to the end that such further order or decree might be made therein as should be just.

The cause was heard by the referee, and on the 26th of July, 1848, he made his report, wherein he found that the trust deed in the pleadings mentioned, executed by Thomas Van Zandt to Daniel L. Van Antwerp, was duly executed and delivered, and conveyed the premises to the grantee therein, in trust, for the uses and purposes therein specified, and that the several parties in interest in the said premises held their respective interests therein under and in conformity with the provisions of the deed. That the defendant, by his "*re-purchase and redemption of the premises sold on the assessment for widening Beaver-street,*" mentioned in the bill and answer, acquired no title to the premises against the other parties in interest under

Burhans v. Van Zandt.

the trust deed, and that he should be required to release to the plaintiff, Burhans, as trustee, for the purposes and benefit of the trust, all the right, title, and interest acquired by him under the re-purchase and redemption. That the defendant should be decreed to deliver over the possession of the premises to the plaintiff Burhans, as trustee. That the right of the defendant to the possession, and the rents and profits, of the premises terminated at the death of Thomas Van Zandt, in April, 1842; and that since that day, the beneficial interest therein, subject to the trusts of the said deed, vested in Hannah Van Antwerp for her life. That the defendant should be decreed to account for, and pay over to the trustee, the rents and profits of the premises since the death of Thomas Van Zandt, with interest thereon; and that on such accounting he should be allowed the amount of all assessments and other charges which he had paid for permanent improvements and which were incurred previous to the death of Thomas Van Zandt, with the interest thereon from his death, and also all assessments, and other proper charges, which he had paid for the benefit, repair, and improvement of the premises, since the death of Thomas Van Zandt, together with the interest thereon; and if such rents and profits should be insufficient to pay the amount so paid by the defendant for such assessment and other charges, then that the trustee should pay the deficiency, with interest, out of the first moneys received by him from the rents and profits of the premises. That the defendant was entitled, under his deed from Stephen L. Van Antwerp, to the share or interest in the remainder, subject to the trust and equitable life estate of Hannah Van Antwerp, to which Stephen, under the trust deed, was entitled. That a reference should be directed, to take an account upon these principles, and that the defendant should pay the plaintiffs' costs to be taxed.

Exceptions were taken by the defendants to the several parts of the referee's report, and the cause was brought to a hearing upon the report and exceptions, together with a case settled in pursuance of the provisions of the order of reference, containing the pleadings and evidence. The evidence, so far as it is ma-

Burhans v. Van Zandt.

trial to the questions decided, is sufficiently noticed in the opinion of the court.

After the referee had made his report, the defendant William J. Van Zandt died, and on the 26th of October, 1848, the present defendants, who are his heirs and personal representatives, were substituted as defendants, in his place.

John Van Buren, for the plaintiffs.

Samuel Stevens, for the defendants.

By the Court, HARRIS, J. A question was raised upon the argument, in respect to the effect to be given to the decisions of the referee upon matters of fact. On the one side, it was claimed that such decisions, like those of a jury, or referees, in an action at law, should only be disturbed, when clearly against the weight of evidence, or in violation of law. On the other side, it is insisted that the report of the referee is to be considered as having the same effect as the report of a master or the decision of a vice chancellor, upon a reference of any matter for hearing and decision. So far as it relates to this case, the question is of no great importance ; for I shall not have occasion, in the view I have taken of the questions involved, to differ essentially from the conclusions of the referee upon mere matters of evidence. I think, however, it is more in analogy with the principles which govern the practice in equity cases, to treat the decision of a referee, not like the verdict of a jury, conclusive upon questions of fact, unless palpable error is manifest ; but, like the report of a master, or a decision of a vice chancellor, upon any matter referred ; where, upon exceptions, or appeal, all questions decided, of fact as well as of law, were the subject of review. In the absence of any settled practice in this respect, I should be inclined to follow this analogy.

Nor do I deem it necessary to determine, in this case, the effect of the decree of the vice chancellor, dismissing the bill filed by William J. Van Zandt to set aside the trust deed executed by Thomas Van Zandt to Daniel L. Van Antwerp.

Burhans v. Van Zandt

Irrespective of this question, and regarding the question of the validity of the deed as strictly *res nova*, I am inclined to think the deed should be established. It is evident that Thomas Van Zandt was a very simple, weak-minded man. Being without family, and having considerable property, it was not strange that his relatives should each make some exertions to secure to themselves what benefit they could from his estate. The most ready way to effect this end, would be to secure the possession of his person—a thing which otherwise, at least in his case, would not have been very desirable. Hence we find him alternately in the keeping of his sister, Mrs. Van Antwerp, and his brother, John Van Zandt. While living with his sister, the trust deed was obtained, which secured to her and her children the exclusive benefit of the property. While living with John, a judgment for an extravagant amount was recovered against him, upon an alledged indebtedness for board; upon which an execution was forthwith issued and the same property conveyed by the deed of trust sold. The object of these proceedings can not be doubted. Each party was striving to gain an advantage over the other; and in the strife, there is some reason to believe that each made use of unjustifiable means to effect their object. I very much doubt whether Thomas Van Zandt, when he executed the deed of trust, understood what it really was, and, on the other hand, there is considerable reason to believe that there was something wrong about the judgment recovered against him. But there is not, in my opinion, sufficient evidence in the case, to warrant a decree pronouncing either the deed or the judgment void for fraud; at least not as between the parties to this suit. Had the question arisen between Thomas Van Zandt and either the grantee in the deed or the plaintiff in the judgment, other considerations might have been involved.

In the further examination of this case, therefore, I shall assume the validity, as between these parties, both of the deed to Daniel L. Van Antwerp, and the judgment recovered by John Van Zandt. We are thus brought to the question, first, as to the effect of the sheriff's sale and conveyance of the premises to William J. Van Zandt, and then the effect of the sale to Pack-

Burhans v. Van Zandt.

ard, under the corporation assessment, and the "re-purchase and redemption" by William J. Van Zandt from him.

The deed executed by Thomas Van Zandt being valid, the entire legal interest in the premises was vested in his grantee; and if he continued in possession afterwards, his possession was not that of an owner, but a tenant of his grantee. From the time he executed the deed until he surrendered the possession to William J. Van Zandt, he must be regarded as holding the premises in subserviency to his grantee. Nothing short of an explicit disclaimer of such relation, and a notorious assertion of right in himself, would be sufficient to change the character of his possession, and render it adverse. (*Jackson v. Burton*, 1 *Wend.* 341. *Zeller's Lessee v. Eckert*, 4 *Howard's Rep.* S. C. U. S. 289.) It is not pretended that there was any such disavowal of Van Antwerp's title, or assertion of an adverse right, by Thomas Van Zandt while he continued in possession. Nor do I think the purchase of his interest at the sheriff's sale, by William J. Van Zandt, and the subsequent entry under such purchase, would, of itself, constitute such an adverse holding as to lay the foundation for the operation of the statute of limitations. It is true, that this is a question of fact, which, upon a trial at law, might properly be submitted to a jury; but I am inclined to think that, in such a case, a jury should be instructed that before they could properly find an adverse possession they should be satisfied, from some legal evidence, that there was at least an intention to hold the possession in defiance of the title claimed under the trust deed. This evidence we have in the bill filed by William J. Van Zandt in 1828, to set aside the trust deed. He then, if not before, asserted his own absolute title to the premises. He then explicitly disclaimed holding under any title subordinate to that under which the plaintiffs now claim. From that time, at least, there can be no doubt of the adverse character of his possession. The statute of limitations then, if not before, began to operate. If, after that, those claiming under the deed to Van Antwerp had allowed the period limited by law to elapse, without asserting their title, such delay must have been held an absolute bar to any subsequent action.

Burhans v. Van Zandt.

From the time, therefore, that Wm. J. Van Zandt openly asserted his title to the premises, in hostility to the title claimed under the trust deed, having already acquired the possession under his purchase at the sheriff's sale, whatever may have been the legal character of his possession before, it then became an adverse possession. No matter though he knew his title was bad. Being in actual possession, it needed only an adverse claim, however wrongful it may have been, and however well he may have known that it was unfounded, to render that possession adverse. It is the very office of the statute of limitations to mature a possession, in itself wrongful, if accompanied by even a pretence of title, into a legal right. (*Humbert v. Trinity Church*, 24 Wend. 587. *Northrop v. Wright*, 7 Hill, 476.) These considerations are suggested, not with a view to the application of the statutory bar to the plaintiff's remedy, but that we may the better understand the relation of the parties to each other and the duty of William J. Van Zandt to the plaintiff, if any he owed, in respect to outstanding charges and incumbrances.

Before considering the effect of the assessment sale, it may be proper to notice the conveyance from Stephen L. Van Antwerp to William J. Van Zandt, of his right, title and interest in the premises; as it is supposed by the plaintiff's counsel to have some bearing upon the relation in which the parties stood to each other, after that conveyance. I admit, to its fullest extent, the doctrine contained in the authorities cited by the plaintiff's counsel, upon this branch of the case. Where two or more persons have a joint claim to property, the community of their interests creates a mutual obligation that neither shall do any thing to the prejudice of the other. An expenditure by one, upon the subject of their common interest, enures to the benefit of all; and, on the other hand, all are bound to contribute towards that expenditure. Neither will be permitted, without the consent of the others, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. "This," says Chancellor Kent, "would be repugnant to a sense of refined and accurate justice. It

Burhans v. Van Zandt.

would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseize and expel his co-tenant." (*Van Horne v. Fonda*, 5 *John. Ch.* 388.) "It is a general principle," says the same eminent jurist, in *Holridge v. Gillespie*, (2 *Id.* 30,) "that if a mortgagee, executor, trustee, *tenant for life*, &c. who have a limited interest, gets an advantage by being in possession, or 'behind the back' of the party interested in the subject, he shall not retain the same for his own benefit, but hold it in trust." But do the plaintiffs bring their case within this principle? We have already seen that William J. Van Zandt openly and notoriously disavowed all community of interest with those who claimed under the trust deed. He asserted his own exclusive ownership of the property. Under these circumstances, it can hardly be inferred that when he took the release from Stephen L. Van Antwerp he intended to abandon his claim of absolute title, and to admit that he held in subordination to the title created by the trust deed. If he did not so intend, then he did not, by the mere act of taking that release, change the character of his claim. For, a party in possession of land, claiming it as his own, under color of title in fee, is permitted to quiet such title, by obtaining a conveyance of an adverse claim, without abandoning his previous claim of title. (*Northrop v. Wright*, *above cited*.) I cannot therefore regard the release executed by Stephen L. Van Antwerp as having any legitimate bearing upon the question under consideration.

What then was the effect of the assessment sale by the corporation of Albany to Packard, and the conveyance by assignment from Packard to William J. Van Zandt? The bill alleges that Wm. J. Van Zandt having acquired the interest of Thomas Van Zandt in the premises by virtue of his sheriff's deed, and being in possession as tenant for the life of Thomas Van Zandt, was bound in equity to protect the plaintiff's estates in remain-

Burhans v. Van Zandt.

der and reversion, and that, disregarding this obligation, he had procured the premises to be sold to Packard for the assessment, and, when the time for redemption had expired, had taken a conveyance from Packard. It is insisted that the sale was in fact made by the corporation to Van Zandt; that his object was to cut off the plaintiffs' rights, and that, as he was in possession and vested with the life estate of Thomas Van Zandt, the purchase by him was a violation of his duty to the plaintiffs, and is, therefore, fraudulent and void.

The answer alleges that William J. Van Zandt took possession of the premises, not as tenant for the life of Thomas Van Zandt, but claiming to hold in fee, and that it was known to the plaintiffs that he so claimed. It also states that Daniel L. Van Antwerp, and also the plaintiffs, knew of the assessment for widening Beaver-street, and of the sale by the corporation for the non-payment of that assessment, and never offered to redeem, or claimed any right to redeem. It further states that, believing he had a perfect title in fee, he had, since the conveyance of the premises to him by the sheriff, with the knowledge of Daniel L. Van Antwerp and the plaintiffs, and without their denying or questioning his title, made valuable improvements upon the premises, and had paid large assessments chargeable thereon; and besides this, had "*paid over the sum of \$200 for the re-purchase and redemption of the premises sold on the assessment for widening Beaver-street, mentioned in the bill.*" It was insisted by the plaintiffs' counsel, upon the argument, that this statement in the answer was to be regarded as an admission by William J. Van Zandt, that he had paid the amount of the assessment to Packard, not as a purchase of his title, but for the extinguishment of a charge upon the premises. It is true, that the pleader, in drawing the answer, seems chiefly to have relied upon the sheriff's deed. Hence we find him insisting that "*the defendant ought not to be required by proof to substantiate the validity of the said judgment and sale, or of his title to the said premises, otherwise than by the said judgment, execution, sale and deed from the said sheriff.*" But I do not think it was intended to waive any rights the defendant had

Burhans v. Van Zandt.

acquired under the conveyance from Packard. The bill had alledged the sale to Packard, and the transfer by Packard to the defendant. The answer, assuming these facts, and apparently with a view to show the defendant's confidence in his own title, and the acquiescence of the plaintiffs in his ownership, states various expenditures made by the defendant on account of the premises, and then adds the payment of \$200, for the purpose of re-acquiring the title which, by the assessment sale, had become vested in Packard, as "mentioned in the complainants' bill." It was a *re-purchase* as well as a *redemption*. The money was paid for the purpose of re-vesting in himself, the title, which, as he alledged, he had first acquired at the sheriff's sale. This, I think, the fair intendment of the pleader in the use of the terms "re-purchase and redemption."

It may also be observed, while referring to the pleadings, that the charges in the bill, in relation to the manner of procuring the assessment sale, are not answered at all. But, as the plaintiffs had waived an answer upon oath, the general traverse, at the conclusion, was sufficient to put these allegations in issue. And, as no proof was given by the plaintiffs in support of these allegations and charges, and the declaration of sale executed by the corporation to Packard, and the assignment by Packard to William J. Van Zandt, were produced by the defendants, it must be assumed that Packard purchased in good faith, and on his own account, and that Van Zandt also purchased of Packard in like good faith. The question then returns, how did this purchase affect the rights of the parties?

The corporation assessment was an incumbrance upon the premises, superior to the rights of either party. In its legal effect, it may be compared to a mortgage executed by Thomas Van Zandt prior to the execution of the trust deed. The validity of the assessment, and the regularity of the proceedings, not being questioned, it can not, I think, be doubted, that Packard, after the period allowed for redemption had expired, acquired an indefeasible title to the premises, for the term specified in the declaration of sale. Had William J. Van Zandt the right to acquire that title, for his own exclusive benefit? If he

Burhans v. Van Zandt.

had not, it must be because he owed some duty to the plaintiffs in respect to that assessment, which would be violated by allowing him thus to avail himself of it, to fortify his title. Let it be conceded, for the present, that, while he was in possession, claiming adversely to all the world, he had, in fact, as the plaintiffs insist he had, an estate for the life of Thomas Van Zandt. As a tenant for life, he would have been bound to keep down the interest upon the incumbrance, out of the rents and profits, but he was not bound to extinguish the incumbrance itself. If he had chosen, rather than allow the premises to be sold, to pay off the incumbrance, such payment would have been an equitable charge upon the premises. In that case, however, he would not have been entitled to interest during the continuance of his life estate. (4 *Kent's Com.* 74, 5th ed.) But he violated no duty, in allowing the premises to be sold. The sale having taken place, and the title having been perfected under the sale, he had the same right as any other person to purchase of the owner. Such purchase would enure to his exclusive benefit, or to the benefit of himself and those claiming the reversion, according to circumstances. If he acquired his possession in such a manner as to owe allegiance to the reversioners, he could not set up an outstanding title thus purchased in by him, to defeat their rights. A possession acquired in subserviency to their title, could not be defended, as against them, by asserting a new title subsequently acquired. The general principle is, that one in possession may purchase in an outstanding title for the purpose of strengthening his own. The only qualification of this rule, of which I am aware, is that to which I have already adverted, that the possession of the purchaser must not have been taken under circumstances which preclude him from disputing the title of the party claiming. (See *Phelan and wife v. Kelly*, 25 *Wend.* 389.) Thus, where one enters under a contract of purchase; or a license, or a lease; or as a tenant in common, he is held to be estopped from controverting the title under which he entered. The qualification of the general principle stated, has its foundation in the law of estoppel, which will not allow a

Burhans v. Van Zandt.

man to do what, in honesty and good conscience, he ought not to do.

But we have already seen that William J. Van Zandt entered under circumstances which constituted his possession, in its very inception, an adverse possession. His claim, from the beginning, was hostile to that of the plaintiffs. He entered, not in subordination to their right, but in defiance of it. There was nothing in the circumstances of the case to impose upon him any obligation to protect the plaintiffs' title, or create a fiduciary relation between them. What principle of law, then, what rule of justice is violated by allowing him to fortify his claim to the property by purchasing an outstanding title held by a stranger? That Packard could have enforced his title against the plaintiffs as well as against William J. Van Zandt, will not be denied. I have considered as well, and as maturely as I was able, the arguments of the very distinguished counsel who presented this case on behalf of the plaintiff, and I have been unable to discover any principle which would not allow William J. Van Zandt, first to acquire, and then to enforce and enjoy, the title of Packard to the same extent, as Packard himself, or any other purchaser, might have enforced and enjoyed it. If I am right in this conclusion, it follows that the defendants have succeeded in establishing, not only an adverse claim, but an adverse title, which must prevail against the plaintiffs' rights.

It is, perhaps, to be regretted that the disposition of so valuable a property should be determined by a legal advantage secured by one of the parties in acquiring the title perfected under an assessment sale, for a comparatively trifling amount. It is still more to be regretted, that the parties should not at the first have been contented with that equal division of the estate of their imbecile kinsman, which natural justice would have suggested. But instead of this, the parties seem to have been engaged in a protracted struggle, each to gain a preference over the other, in the division of this inheritance. And now, if the contest has resulted in the plaintiffs' defeat, through the operation of the assessment sale, that result must be attributed, not to any fault in the law, but to their own neglect, in allowing an

Larue v. Rowland.

adverse title to be perfected against them, when they might, by the payment of the assessment before the sale, or the redemption of the property within the prescribed period afterwards, have protected the rights they had acquired under the trust deed.

The plaintiffs' bill must be dismissed ; but under the peculiar circumstances of the case, to which I have already sufficiently adverted, I think it should be without costs, also without prejudice to the plaintiffs' remedy at law.

Decree accordingly.

SAME TERM. *Before the same Justices.*

LARUE vs. ROWLAND.

Books of account should only be received in evidence upon preliminary proof that they contain original entries, made by the party himself; that they are fairly kept; and that the party had no clerk, and had dealings with the person charged.

These are questions upon which evidence is to be addressed to the court, to enable it to determine whether the books of account shall be received as evidence at all.

So also fraudulent circumstances may be proved, for the purpose of rendering the books incompetent evidence.

A defendant, in order to establish a set-off, after making sufficient preliminary proof, offered in evidence a *day book* and a *ledger*, and upon inspection, it appeared that the entries in the day book were of a date several years anterior to the trial, and that the defendant had another day book, containing entries of a later date, in which the account with the plaintiff was continued. The ledger showed one item posted from this second day book, to the plaintiff's account. No excuse being given for not producing the second day book ; *Held* that the other books were not competent evidence, to prove the set-off.

Books of account, to some extent, partake of the nature of documentary evidence. Hence all the books containing entries relating to an account, when relied upon as furnishing evidence to sustain the account, should be produced ; in order that the other party may have the benefit of *all* the entries made therein.

Larue v. Rowland.

APPEAL from the Schoharie county court. Larue sued Rowland before a justice of the peace for a quantity of manure sold and delivered to him. The defendant pleaded the general issue, and gave notice of set-off. Upon the trial, the plaintiff proved that the defendant had of him seven loads of manure, worth three shillings per load. The defendant, who is a physician, offered an account against the plaintiff, as a set-off. He proved by *Charles Knox* that he had dealt with the defendant, and settled with him from his books, and found the account upon the books all right. The witness identified the defendant's day book A, then in court, as the book he looked over when he settled. *Mary Strain* testified that the defendant had *doctored* the plaintiff's son, *Wardell*, when he had fits, about two years previous; that he also attended the plaintiff's wife when *Wardell* was born. *Wardell* was six years old the fall previous to the trial. *Mary Shont* testified that the defendant attended the plaintiff's daughter when she had the scarlet fever, about three years before the trial. *Jacob Shont* testified that, about five or six years previous, he had settled an account with the defendant, from his books, and found it all correct. He thought the books in court were the same he settled from. *Spencer Foster* testified that the defendant had performed medical services for his family; that he had settled with him the fall before, from the books in court, and found all correct.

The defendant then offered in evidence his *day book A*, which was filled up with accounts; also a *ledger*, in which charges against the plaintiff to the amount of \$18,25 were posted from day book A. The last of these charges was made in 1841. In the ledger there was also a charge of \$2,50, posted from *day book B*. The defendant stated that this was a mistake; that he did not claim for any charge on *day book B*; that he had no other account books *than those in court*. The plaintiff then objected to the introduction of the books as evidence, on the ground that they were not all the account books of the defendant; that *day book B*, referred to in the ledger, should be produced as *it would show credits to the plaintiff*. The objection was overruled. The plaintiff then recalled *Spencer Foster* and

Larue v. Rowland.

proved by him, that when he settled with the defendant his accounts were in another day book, which was not then in court; *that the defendant had two day books.* The plaintiff again asked the justice to reject the books, and not permit them to go to the jury as evidence. The motion was denied. The plaintiff gave in evidence a receipt, signed by the defendant, as follows: "Received of N. M. Larue one dollar in full of all demands up to this date. Sloansville, August 25, 1842. Amos Rowland." The jury found a verdict in favor of the defendant for \$9,63, for which amount, with \$3,96 costs, the justice rendered judgment. The Schoharie county court affirmed the judgment. From that judgment the plaintiff appealed, pursuant to the provisions of the code.

J. H. Ramsay, for the plaintiff.

C. G. Clark, for the defendant.

By the Court, HARRIS, J. Books of account are received in evidence, only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all, is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor. The practice of admitting such evidence is, I believe, universally adopted. It is said that it has its origin in a kind of "moral necessity," and that such is the general course of business that no proof could be furnished of the frequent small transactions between men, without resorting to the entries which they themselves have made, in the form of accounts. The practice can only be justified upon the ground that, without such evidence, there would, in many cases, be a total failure of proof. It may be added, that it has been often doubted, by those too, who have had the best opportunities for observing the facilities for frauds, which this loose species of evidence affords, and the abuses which, in inferior courts, have been perpetrated under it, whether it would not have been more wise, to have excluded such evi-

Larce v. Rowland.

dence altogether. At the very best, it is but presumptive evidence, and that, too, of the lowest grade. It should always be received with extreme caution, and be subjected to the strictest scrutiny. The common law did reject it altogether. In countries where the civil law prevails, books of account are generally received in evidence, in connection with the oath of the party. But to make them evidence at all, the books must have been kept in a manner so cautious as, in a great degree, to furnish a guarantee against abuse. In many, perhaps most of the United States, what is called the suppletory oath of the party is required. In this state that practice has not obtained; and I agree with Justice Cowen, that "frail as such proofs must be, the law can hardly be censured for thinking they would be but little fortified, by the suppletory oath of an interested and excited party." (See *Sickles v. Mather*, 20 *Wend.* 72. *Cowen & Hill's Notes*, 682.)

Notwithstanding what I have said, I admit the necessity which receives this species of evidence. In a country like ours, where the artisan and the tradesman are compelled, by the usages which have obtained, to give credits to their customers, and yet in very many instances, can not afford to keep clerks, the customary entries, made in the usual course of business, must, to prevent greater injustice, and when free from all suspicion of dishonesty and unfairness, be received as evidence of the transactions to which they relate. All I claim is, that the true character of the evidence should be appreciated. The general rules which experience has suggested, as safeguards against dishonest practices, are, that the evidence should only be received, upon preliminary proof that the books offered contain original entries, made by the party himself; that they are fairly kept; that the party had no clerk, and had dealings with the person charged. These are questions upon which evidence is to be addressed to the court, to enable it to determine whether the books of account shall be received as evidence at all. So also, fraudulent circumstances may be proved, for the purpose of rendering the evidence incompetent. Thus, it may be shown that material and gross alterations have been made, or that entries have

Larue v. Rowland.

been made *post litem motam*, and even that they were not made at or near the time of the transaction. In short, any thing may be proved which will show that the books are unworthy of credit; and if the proof sustains the objection, it is the duty of the court to reject the evidence as incompetent, and leave the party to his common law proof. (*Coggeswell v. Dalliver*, 2 Mass. Rep. 217; *Eastman v. Moulton*, 3 New Hamp. Rep. 156.)

In the light of these principles, let us advert to the facts of the case under consideration. The defendant, to establish his set-off, offered his books of account as evidence. He gave, what, in the first instance, should perhaps be considered sufficient preliminary proof. The books offered were a *day book* and a *ledger*; and upon inspection, it appeared, that the entries in the day book were of a date several years anterior to the time of the trial, and that the defendant had another book, containing entries of a later date, in which his account with the plaintiff was continued. The ledger showed one item posted from this second day book to the plaintiff's account. The plaintiff alledged that the second day book, if produced, would be found to contain credits varying the account in his favor. The defendant denied that he had such second day book, but, besides the evidence of the ledger itself, one of his own witnesses with whom he had settled an account from the very book, was recalled and proved its existence, beyond all question. Under these circumstances the justice was undoubtedly called upon to reject the books as incompetent. If the account had been paid or if the plaintiff was entitled to credits applicable to the account, they would have been most likely to have been found entered in the books at a later date than the charges. In *Prince v. Swett*, (2 Mass. Rep. 569,) a day book was offered in evidence to prove an account for goods sold and delivered. When produced it appeared from the post marks upon it, that the account had been posted to a ledger. The court held, that it was necessary to produce the ledger, as well as the day book, that the other party might have the advantage of any items entered in it to his credit. The existence of the second day book in this

Larue v. Rowland.

case was proved. The defendant did not pretend that he was unable to produce it, and assigned no reason why he did not produce it. It is a just rule of evidence that when a demand is made upon a party to produce his books of original entries and he refuses, without assigning a satisfactory reason for it, every thing is to be presumed against him, which the nature of the transaction will warrant. I can not see what is to exempt the defendant from the operation of this rule. He was required to produce a book of original entries. He refused, and gave no excuse for it. The book might well have contained credits to the plaintiff, sufficient to balance the account. There is some reason to believe, from what occurred, upon the trial, that it did, in fact, contain such credits. The justice, therefore, erred in allowing the books to go to the jury, as evidence to establish the defendant's account against the plaintiff. Besides, I think the evidence should have been excluded upon another principle. Books of account, to some extent, partake of the nature of documentary evidence, in respect to which it is a cardinal rule that part of an instrument can not be received while a part is withheld. The whole must be taken together. So, I think it is with regard to books of account. All the books containing entries relating to the account, when relied upon as furnishing evidence to sustain the account, should be produced. A party should no more be allowed to withhold a part of the account while he avails himself of another part, as evidence in his favor, than a part only of a deed or other document should be received in evidence. The fact that the account ran into two books, can not vary the principle. It is the same, in legal effect, as though the defendant had insisted upon sealing up one-half of the day book he offered, and having the remaining half received as evidence in his favor. The only proper or safe rule to apply in such a case, is, that if a party in, derogation of the fundamental and salutary rule of evidence, that one shall not be permitted to make testimony for himself, seeks to introduce his own entries, in his own books, as evidence of the dealings to which they relate, he shall, at least, allow the party to be affected by such evidence, the benefit of *all* the entries he has

Baker v. Hoag.

made. Common fairness demands it. Upon this ground, also, the books should have been excluded. For these reasons, I think the judgment below should be reversed.

Judgment reversed.

SAME TERM. *Before the same Justices.*

BAKER vs. HOAG.

The statute relating to wrecks has no application to the case of property found sunk in the channel of a navigable river.

The provisions of the statute relate exclusively to such property as at common law, is known as wrecks, and to the charges upon such property known as salvage, and the expenses incurred by virtue of the statute. What was *wrecked property*, at common law, is wrecked property under the statute.

Finding property, sunk in the channel of a river, and saving and restoring it to the owner, is to be regarded as the ordinary case of finding the lost property of another and incurring labor and expense in replacing it in his possession. The finder has no lien for salvage, either at common law or by statute.

Yet the finder may, by the *agreement* of the owner, become entitled to a lien upon the property, for his labor and expenses in rescuing it.

Thus, if the owner of property lost has offered to any person who should find and restore it, a reasonable compensation for his trouble and expense, and a person, relying upon such promise, undertakes to secure the property, and does in fact rescue it, and is ready to deliver it to the owner, upon being paid for his labor and expenses, he is entitled to receive his compensation before he parts with the possession of the property.

The party performing such services upon property, at the request of the owner, becomes a bailee for hire, and as such has a lien upon the thing itself, for the amount of his compensation.

THIS was an action of replevin, tried at the Greene circuit, in April, 1849, before Justice Wright. It appeared upon the trial, that on the 16th of November, 1846, the canal boat William Henry, having on board 18 bales of wool belonging to the defendant, while being towed down the Hudson river, was sunk

Baker v. Hoag.

in the channel of the river near four mile point, in the county of Greene, in consequence of a collision with a steamboat. Shortly after this occurrence the defendant came to the place and employed men to fish for the boat, but without success. On the 16th of January following the boat was discovered and the plaintiff, with several men in his employ, undertook to secure the boat and cargo. After several days they succeeded in dragging the boat to the shore and getting her up, and commenced unlading her cargo. They finished getting out the wool on Saturday preceding the first of February, about noon. Other portions of the cargo still remained in the boat. On Monday morning, the first day of February, about sun-rise, the defendant came and took the wool and removed it to Hudson, and on the same day it was re-taken upon the writ of replevin issued in this suit. When the defendant came to take the wool, the plaintiff forbade him, on the ground that he had a charge upon it, for getting it out of the river. The defendant said he did not care for that; he would take the wool.

George Hotaling testified that when the defendant was there, in the fall, he had requested him and others to look for the boat, and said he would see that they were paid. *Andrew Hotaling* testified that when the defendant was there, after the boat had been sunk, he wished the persons about there to search for the boat, and had requested him, the witness, to write to him when the boat should be found; that the boat was discovered on Saturday, and the next day he informed the plaintiff that he was going to write to the defendant, and he did write to him accordingly. In reply to his letter the defendant wrote from New-York under date of the 20th of January, as follows: "Your favor of the 17th inst. is at hand, and I feel much obliged by your kind offer to take charge of my wool, as sickness prevents me from coming up at present. I would like the wool taken to Hudson. Write me what day it will be there, and I will come or send some one to meet it and you there and pay the expense." Upon the receipt of this letter the plaintiff offered to deliver the wool to Hotaling on behalf of the defendant, but Hotaling having learned that one Huxford claimed

Baker *v.* Hoag.

to act as the defendant's agent, declined taking it. The plaintiff said he had refused to deliver the wool to Huxford because he was not a responsible man, and that he knew Hotaling to be responsible.

Upon this evidence the plaintiff claimed to have a lien on the wool, either at common law, or under the statute relating to wrecks—also, that he had a right to have the evidence submitted to the jury upon the question whether the plaintiff had not offered or agreed to pay a reward or compensation to the plaintiff for his services in finding the boat and rescuing the wool; but the court decided otherwise, and directed the plaintiff to be nonsuited. To all which decisions the plaintiff's counsel excepted. A motion was made for a new trial, upon a bill of exceptions.

Dft.

H. Hogeboom, for the plaintiff.

K. Miller, for the defendant.

HARRIS, J. When this cause was before us, on a former occasion, it was held that the plaintiff, at the time of the commencement of the suit, had no lien upon the wool, either at common law, or by statute. (3 *Barb. S. C. Rep.* 203.) In that decision I concurred. I still think the conclusions at which my learned associate arrived, in his examination of the case, were correct. I can not, however, concur in all the views expressed in the opinion, as the ground of the decision.

A wreck is defined by elementary writers to be such goods as, after a shipwreck, are cast upon land by the sea, and left there within some county, so as not to belong to the jurisdiction of the admiralty, but to the common law. (*Bouvier's Law Dic. Wreck.* 1 *Bl. Com.* 290.) The first section of our statute relating to wrecks, contains substantially the same definition. (1 *R. S.* 690.) It is declared that "no ship, vessel, or boat, nor any goods, wares and merchandise, that shall be cast by the sea upon the land, shall be deemed to belong to the people of this state, as *wrecked property*, but may be recovered by

Baker *v.* Hoag.

the owner, &c. upon the payment of a reasonable salvage and necessary expenses." *Wrecked property*, therefore, is such property as is "cast by the sea upon the land." *Salvage* is defined to be the compensation to which any person may be entitled for services rendered to a ship in distress, by saving it, or its cargo, from impending perils, or recovering the same, after actual abandonment or loss. (*Bouvier's Law Dic. Salvor. Story on Bailm.* § 622.) It will be seen, therefore, that the term "reasonable salvage," found in the first section of the statute, is only applicable to the kind of property described in that section as property "cast by the sea upon the land."

The second section of the statute declares it to be the duty of certain officers, when "wrecked property" shall be found, and no owner, &c. shall appear, to take the necessary measures for saving and securing the property. And all the subsequent provisions of the statute relate to the disposition of the "*wrecked property*," the adjustment of salvage, and other matters having reference to the disposition of the property and its proceeds. If the sheriff, coroner, or wreck-master has taken possession of the "wrecked property" before the owner appears, it is to be detained, though he subsequently appear, until all reasonable claims for salvage and necessary expenses are paid. In any case, whether the owner appears to claim the property before the officer has taken possession, or afterwards, if the parties—those claiming the property and those claiming to be paid salvage and expenses out of the property—do not agree upon the amount to be paid, the mode of determining such amount is prescribed. The 25th section also imposes penalties upon those who, having in their possession wrecked property, shall, for 48 hours, omit to deliver it to one of the officers mentioned. All these provisions, obviously, and, I think, exclusively, relate to such property as, at common law, is known as wrecks, and the charges upon such property known as salvage, and the expenses incurred under the provisions of the statute. The legislature intended to regulate the proceedings in relation to that specific class of property, and nothing more. What was *wrecked property* at common law is *wrecked property* under the statute.

Baker v. Hoag.

If a person rendering any service in saving the property would have a lien for his salvage at common law, that lien is protected by the statute. If he would have no lien at common law, none is given by the statute. If, therefore, my learned brother was right, as I think he has clearly shown he was, in holding that at common law the plaintiff had no lien upon the wool for salvage, it follows that none was acquired under the statute. In other words, the statute relating to wrecks has no application whatever to the case. It is to be regarded as the ordinary case of one man finding the lost property of another, and incurring labor and expense in saving and restoring it. The fact that the property was found sunk in the river, can not entitle the finder to a lien for salvage, any more than though it had been found upon the bank of the river. Nor would the finder in either case be entitled to claim salvage any more than he would if the property had been found upon the land. The case is in no respect within those principles of public policy and commercial necessity which, in all civilized and maritime countries, have supported and enforced the law of salvage. It having been held at the first trial, as matter of law, that the plaintiff was entitled to a lien upon the wool for his services and expenses, it became necessary, for this reason, to send the cause back for a new trial. Upon the second trial, a further question was raised, which was not involved in the former decision. The plaintiff claimed that, although he might not be entitled to a lien upon the wool for his services and expenses, at common law or by statute, he was entitled to such lien by the agreement of the defendant, and therefore that he had a right to have the evidence submitted to the jury upon that question. In this I think he was right.

The right to create a lien by contract, where none existed by law, is unquestionable. *Conventio vincit legem* is a maxim as old as the law. The effect, too, of a contract is the same, whether it be expressed in definite terms, or is inferred from the circumstances of the transaction. The only difference is, in the mode of establishing the existence of the contract. In the one case, it is established by proof of an actual agreement. In

Baker *v.* Hoag.

the other, by the proof of facts and circumstances from which the existence of an agreement is inferred. When established, the effect of each is identical. Here the plaintiff claims to have proved a state of facts from which a jury would have a right to find that there was an agreement on the part of the defendant that if the plaintiff would find and secure his wool, he should have a lien upon it for his labor and expenses. The defendant, shortly after the boat, with the wool, had been sunk, had himself, made efforts to regain his property. He had employed men to fish for the boat. When he left, he requested the persons about there to continue the search for the boat, and promised to see them paid. Perhaps he said enough to amount to a public offer of a reward to any person who should find the boat and secure his wool. The letter to Hotaling, after the wool was found, would furnish some evidence in support of this position. He requests him to inform him as to the amount of expense of getting up the boat, and speaks of his obligation to pay his proportion of such expense.

The case of *Wentworth v. Day*, (3 *Metc.* 352,) is in point, upon this branch of the case. The plaintiff had lost his watch, and had caused an advertisement to be published in a newspaper, offering to any person who would return the watch to the office of the newspaper, a reward of twenty dollars. The defendant's child found the watch, and delivered it to the defendant, who took it to the printing office, and left it with the printer, to be delivered to the plaintiff, on his paying the reward. The plaintiff having refused to do this, the defendant resumed the possession of the watch, and afterwards, when the plaintiff demanded it of him, refused to give it up, unless the plaintiff would pay him the \$20 for his son. The plaintiff brought trover for the watch. It was held, that the promise in the plaintiff's advertisement imposed on him the duty of paying the reward; that the acts of performance were to be mutual and simultaneous; the one was to give up the watch on receiving the reward, and the other to receive the watch on paying the reward; and that this being the legal effect of the plaintiff's contract, the defendant being ready to deliver the watch, was not bound to

Baker v. Hoag.

surrender the actual possession of it, until he received the reward. In legal effect, therefore, the plaintiff's contract gave the defendant a lien upon the watch for the reward.

So, in this case, if a jury should find from the evidence, that the defendant intended to offer to any person who should find and restore his property, a reasonable compensation for his trouble and expenses, and that the plaintiff, relying upon such promise, undertook to secure the property, and did in fact, rescue it, and was ready to deliver it to the defendant, upon being paid for his labor and expenses, he was entitled to receive his compensation before he parted with the possession of the property. I am unable to distinguish the case from that of any other services performed upon property upon request of the owner. The party performing such services becomes a bailee for hire, and as such has a lien upon the thing itself for the amount of his compensation. (*Story on Bailm.* § 440.)

I think, therefore, that the case should have been left to the jury, with instructions to find for the plaintiff, if they believed from the evidence that the defendant had offered to reward any person who should recover for him his property, and that in pursuance of such offer, the plaintiff had performed the service contemplated by the defendant when he made the offer. On the contrary, that they should find for the defendant, if they should believe that the plaintiff, having found the boat, voluntarily performed what he did, without any promise of reward by the defendant. A new trial must be granted; costs to abide the event.

WATSON, J. concurred.

WRIGHT, J. dissented.

New trial granted.

SAME TERM. *Before the same Justices.*

**JACOB MESICK, executor, &c. of Thomas Mesick, appellant, vs.
STEPHEN MESICK and others, respondents.**

Upon the final settlement of the accounts of executors, before the surrogate, legatees who have appeared by their counsel before the surrogate, and are contesting the executors' accounts, are not competent witnesses; although, upon being offered as witnesses, they have assigned their claims upon the estate.

But a legatee who has been paid the full amount of his legacy, and has executed to the executors a receipt in full, is a competent witness.

Ordinarily, an executor is not liable for money received by his co-executor. But where one executor, having the actual possession of money or securities belonging to the estate, hands over such money or securities to his co-executor, he will only be exempted from liability, upon showing good reason for having done so.

Accordingly, where an executor had assets of the testator in his possession, and had given a receipt for them, in which he undertook to collect the same, and apply the proceeds in the manner designated by the testator; and he afterwards voluntarily delivered such assets to his co-executor, without any good reason for so doing; *Held*, that he was answerable for a misapplication of the assets by his co-executor.

And if such receipt, given by the executor for the assets, embraces a debt owing to the testator by the executor himself, the receipt will be held a solemn recognition of the existence of the demand, by him, and he should be charged therewith, by the surrogate, on the final accounting of the executors.

THIS was an appeal from the decree of the surrogate of Albany, upon the final settlement of the accounts of Jacob Mesick, the appellant, and the respondents Stephen Mesick and Henry Van Denburgh, as executors of the will of Thomas Mesick, deceased. The will was executed on the second day of April, 1840. The testator first directed that his debts, and the legacies mentioned in the will, should be paid by the executors out of his personal property, if sufficient for that purpose, and if not sufficient, then that such debts and legacies should be a lien upon his real estate. He then gave to each of his sons, Thomas, Peter, John, Henry, George and Stephen, and to each of his daughters, Christina and Mary, and to the children of his deceased son William, legacies of \$375, to be paid in one year

Mesick v. Mesick.

after his decease, with interest from the date of his will. He also gave to the wife of the appellant a legacy of \$200, and to each of his two daughters \$50, payable when they should attain the age of twenty-one years. In conclusion he gave to his son Jacob, the appellant, his heirs and assigns, all his real and personal estate after paying the legacies above set forth. At the time the will was executed, the sons of the testator were all present. An inventory was made of the notes and other securities belonging to the testator. It amounted to \$3910,59, and included a demand of \$600 against the appellant Jacob Mesick. At the foot of this inventory a receipt was drawn and signed by Jacob Mesick as follows: "Rec'd, April 2, 1840, from S. Mesick and H. Van Denburgh, executors of the last will and testament of Thomas Mesick of Guilderland, the above notes belonging to the estate, amounting to \$3910,59. Rec'd for collection for the estate, and to account to the executors for the same, and for to pay off the legacies in the will. Jacob Mesick."

The testator having died, letters testamentary were granted to all three of the executors named in the will, on the 11th day of May, 1842. A final settlement of the accounts of the executors, upon their own application, was had before the surrogate of Albany, and a decree made on the 13th of May, 1847, whereby it was determined that Stephen Mesick and Jacob Mesick had received of the personal estate and effects of the testator \$4748,33 including interest to the date of the decree; that Stephen Mesick had received individually \$170, and Jacob Mesick was individually chargeable with \$413 for personal property received by him from the estate; that Stephen Mesick and Jacob Mesick were entitled to credits to the amount of \$2978,12, including the legacy of \$375 paid to John Mesick, and that they were still chargeable with a balance of \$1978,21, of which \$170 was to be paid by Stephen Mesick individually, \$413 by Jacob Mesick individually, and the balance of \$1395,21 by Stephen and Jacob jointly. The decree also charged Stephen and Jacob with the costs of the guardian of the infant legatees, allowed at \$25, the costs of Henry Van Denburgh, one of the

Mesick v. Mesick.

executors, allowed at \$42,62; and the surrogate's fees, amounting to \$65,35.

Upon the hearing, the appellant claimed that he had applied, in the due course of administration, all the moneys collected by him upon the securities left in his hands on the second of April, 1840. And that he had delivered over to his co-executor Stephen Mesick, the residue of such securities. The surrogate held that Jacob Mesick, as well as Stephen, was liable to account for the securities delivered over to Stephen, and which were, or might have been, collected by him. The surrogate charged Jacob Mesick with \$343 as the value of certain articles of personal property belonging to the estate and which had been received by him. Also with \$70 for money received of one Lanehart for the estate, making the sum of \$413, for which he was decreed to be individually liable. These were the grounds of error complained of by the appellant in his petition of appeal. The respondents specified as erroneous the allowance by the surrogate to the appellant of \$507.20 for expenses incurred in establishing the will. And also that the surrogate had not charged the appellant with the item of \$600 for the demand against himself mentioned in the inventory and receipt of the second of April, 1840. Upon the hearing before the surrogate Peter T. Mesick and George Mesick were offered as witnesses, on the part of the legatees. They were objected to by the counsel for the appellant, on the ground of interest. It appeared that while the proceedings were pending before the surrogate, and for the purpose of making them competent witnesses, they had severally assigned the balance of their respective legacies. They were still objected to, on the ground that they might be liable for costs, and were therefore interested. John Mesick, another legatee under the will, was offered as a witness, and objected to as interested. It appeared from the account of the appellant, and his vouchers filed with the surrogate, that his legacy had been fully paid.

R. W. Peckham, for the appellant.

J. Lansing, for the respondent.

Mesick v. Mesick.

By the Court, HARRIS, J. I think the objection to the witnesses Peter T. Mesick and George Mesick, on the ground of interest, was well taken. They were clearly interested in the result of the matters in litigation before the surrogate. As legatees claiming under the will, they had appeared by their counsel before the surrogate, and were contesting the appellant's account. Though they had, when offered as witnesses, assigned their claims upon the estate, they were still parties to the proceedings, and might have been charged with costs, in the discretion of the surrogate. They are proper parties to this appeal, and may yet become liable for costs. The surrogate, therefore, erred in allowing them to be examined as witnesses on behalf of the respondents, and their testimony must be rejected. But John Mesick was a competent witness. He had been paid the full amount of his legacy, and had executed to the executors a receipt in full. Although it is stated in the return that Mr. Lansing appeared for all the legatees, except the minors, who appeared by guardian, yet I understand that it is only meant that the legatees still claiming an interest under the will appeared. This is further evident from the fact that John Mesick is not made a party to the appeal. He was in no way interested in the question upon which he was to be examined. He was therefore properly admitted.

The testimony of Peter and George Mesick being rejected, it necessarily follows that the charge against the appellant for \$70, collected of Lanehart in 1839, and also the charge of \$343 for personal property of the testator, received by the appellant, must be rejected, and that part of the decree which charges the appellant with the payment of \$413, on account of these items, must be reversed. George Mesick is the only witness in respect to the charge of \$70, and without his testimony there is not sufficient evidence to sustain the charge of \$343. It is true that John Mesick speaks, in general terms, of the personal property, but he does not specify the items, or the value. His testimony alone is insufficient to sustain this part of the decree.

I think the surrogate was right in holding the appellant responsible for the securities which he received on the 2d of April,

Mesick v. Mesick.

1840. It was not pretended that the securities were uncollectable, or that they had not in fact been collected, but the appellant insisted that, having handed them over to Stephen Mesick, his co-executor, he was exonerated from further liability. It is true that, under ordinary circumstances, an executor is not liable for money received by his co-executor. But where one executor, having the actual possession of money or securities belonging to the estate, hands over such money or securities to his co-executor, he will only be exempted from liability, upon showing good reason for having done so. The rule is stated, in the authorities, to be, that where, by an act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had intrusted to receive it. (*Clark v. Clark, 8 Paige, 142, and cases there cited.*) The same rule is perhaps better stated in *Williams on Executors*, 1119. "If an executor," he says, "is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not responsible. If, however, the one in any way contributes to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent; unless he can assign a sufficient excuse." Applying this rule to the appellant's case, there can be no doubt of his liability. He had the assets of the testator in his possession. He had, moreover, undertaken to collect those assets, and apply the proceeds in the manner designated by the testator. He voluntarily delivered those assets to his co-executor. No good reason is shown why he should thus transfer the possession. If, therefore, the assets have been misappropriated by his co-executor, he must be held answerable for such misappropriation.

The expenses incurred by the appellant in establishing the will were properly allowed to him by the surrogate. It is true, that the effect of such allowance is to charge those expenses upon the legatees exclusively. But I can not say that this is unjust. It was on their behalf that the probate of the will was resisted. It is probable that they were ignorant of the existence

Mesick v. Mesick.

of the deed conveying to the appellant all the testator's real estate; or if not, that they supposed the deed might be successfully attacked. Otherwise neither party could have had any interest in contesting the probate of the will. The distribution of the personal estate among the legatees was substantially the same as it would have been among the next of kin, if the will had been rejected. The parties were therefore only interested in having the will established or defeated as it affected the real estate; and if the deed executed by the testator to the appellant was to take effect, there was no real estate to be affected by the will. But whatever may have been the object of the parties in contesting the probate of the will, at so great expense, the respondents failed in the contest, and, so far as I can see, are rightfully subjected to the expenses incurred by the appellant in that litigation.

But in respect to the demand of \$600 against the appellant, embraced in the receipt of the second of April, 1840, I think the surrogate has misapprehended the effect of the evidence. That receipt was a solemn recognition of the existence of such a demand. The appellant is presumed to have been fully cognizant of all that the instrument signed by him contained. This item was evidently taken into the account, in the estimates made at the time the will was executed, for the purpose of ascertaining the amount of the legacies which the testator would be able to pay to his children. The testator's intention manifestly was that the appellant should pay the full amount of those legacies. Hence it was that when he executed the will he not only placed in the hands of the appellant securities, including the \$600, sufficient to pay all the legacies, but also expressly charged his real estate with the payment of any deficiency, and then devised all his real estate, subject to such charge, to the appellant. It is quite evident from the tenor of the will, that at the time it was executed, neither the testator nor his children, with the exception, perhaps, of the appellant, understood that the title to his farm was already vested in the appellant. If, in fact, the farm had been so conveyed, and the personal property, too, had already been given to the appellant, there was but little neces-

Mesick *v.* Mesick.

sity for making a will, for the mere purpose of distributing among the children of the testator in equal proportions the proceeds of the securities he yet held. All the circumstances attending the transactions which occurred at the time the will was executed, tend, in my judgment, to show very satisfactorily, that the appellant, though he had succeeded in having the note he had given for the \$600 he owed the testator destroyed, was yet willing to recognize his liability for that amount, for the sake of having a provision inserted in the will, which would at least put at rest his title to the farm and the other property. The appellant now insists that when he signed the receipt he was ignorant that the item of \$600 was included in the inventory. Until this is shown, the contrary is to be presumed. The only proof upon which he relies is in the testimony of Thomas Mesick, his son, and Nathaniel Smith, his nephew. Thomas was at the time of the transaction but 16 years old. It is scarcely to be supposed that such a boy, called to testify in relation to such transactions, after the lapse of seven years, would be able to recollect with much distinctness the circumstances which occurred. I can only regard his testimony as amounting to this: that he was at home when the business was done, and present with the parties a part, perhaps most, of the time, and that he has no recollection of hearing the receipt read, or seeing his father sign it. Smith was also a schoolboy at the time, and witnessed the execution of the will. He saw the appellant sign the receipt, at the time the will was executed, but did not hear it read. Such testimony can not be regarded as sufficient to control, in any respect, the effect of the instrument deliberately executed by the appellant. The appellant ought, therefore, to have been charged personally with the \$600, and interest thereon from the date of the receipt.

The decree of the surrogate must be modified so as to conform to these views. Neither party should have costs upon the appeal as against the other.

SAME TERM. *Before the same Justices.*

VAN RENSSELAER vs. COTTRELL.

The only facts necessary to the jurisdiction of assessors are, in reference to real estate, that it be situated in the town or ward, and, in reference to personal property, that the owner be an inhabitant of the town or ward.

If lands assessed are situated within the town in which the assessors reside, the assessors have jurisdiction of the subject matter. And in making an assessment upon such lands they perform a judicial act, in a matter within the limit of their authority.

However much assessors may have erred in the performance of their duty, yet having jurisdiction of the subject matter, their error may be corrected, in a court of review, but will not render their proceedings void.

When an assessment roll is delivered to the supervisors, though uncorrected errors may appear upon its face, they are not authorized, on that account, to reject or disregard it, but must proceed to annex the tax list, and issue their warrant for its collection. It is equally the duty of the collector to execute the warrant; and both will be protected in the discharge of this duty. *Per HARRIS, J.*

Occupied lands, which are owned by persons who are not residents of the town or ward where they are situated, are liable to taxation. And the legislature having omitted to prescribe the manner in which the assessment of such lands shall be made, it is proper for the assessors to specify who is the occupant, as well as the name of the owner.

Either would be a sufficient compliance with the law. They may regard the occupant as owner, and assess the lands as owned by a resident of the town; or they may, without noticing the occupant, assess them as lands of a non-resident owner.

After a tax has been regularly assessed upon lands situated in a town other than that in which the owner resides, if the owner neglects or refuses to pay the tax, the collector of the town in which the lands lie will be justified in levying and collecting such tax of the goods and chattels of the owner.

It seems that the warrant attached to an assessment roll, if regular and legal on its face, is a perfect protection to the collector acting under it; and that he is not bound to look beyond it. *Per HARRIS J.*

THIS was an action of trespass for taking and selling the plaintiff's horse. The defendant was collector of the town of Sand Lake, in the county of Rensselaer, and justified the taking, under a collector's warrant issued in December, 1845. The trial was had before Justice WATSON, at the Rensselaer circuit, in November, 1847. It appeared from the assessment

Van Rensselaer v. Cottrell.

roll annexed to the warrant, and which was produced upon the trial, that the plaintiff had been assessed for various tracts and parcels of land in the town of Sand Lake, and among others about forty parcels of land *covered with water*. The first of these parcels is described as follows: "Land under water extending from the line of Brunswick in Sand Lake, to the Poestenkill school lot, eight acres, valued at \$16." The second parcel is described as follows: "Land under water, *occupied* by Coonrod C. Cooper and used as a grist and saw mill privilege, two acres, valued at \$400." These two instances will serve as examples of all the rest. They were all described in one or the other of these forms. The plaintiff paid to the collector all the taxes assessed upon his lands, except those under water. Before the seizure, he informed the defendant that he did not consider himself bound to pay these taxes, and should contest their validity. The warrant was in the usual form, and commanded the defendant to collect from the persons named in the assessment roll annexed thereto, the several sums mentioned in the last column, &c. The plaintiff resided in Greenbush. The judge charged the jury that the warrant attached to the assessment roll was regular and legal on its face; and that being so, it was a perfect protection to the defendant who was acting under it, when he took the plaintiff's property, and that he was not bound to look beyond it; that the warrant and assessment roll were not necessarily connected; that, as to the defendant, the warrant and roll were to be considered and treated as distinct instruments, having no dependence on each other farther than to ascertain the amount of the tax and the names of the persons assessed; that the warrant, if valid, controlled and protected him, even if the roll was irregular, or the assessment erroneously made. The counsel for the plaintiff excepted to the charge and instructions of the judge, and requested him to charge the jury that the assessments were illegal and void; that the warrant and assessment roll were necessarily connected, and that not only the warrant but the assessment against the plaintiff, must be legal and valid on their face, to protect him. The judge refused so to charge, and the counsel for the

Van Rensselaer v. Cottrell.

plaintiff excepted. The jury found a verdict for the defendant. A motion was made for a new trial upon a bill of exceptions.

D. Buel, Jr. for the plaintiff.

D. L. Seymour, for the defendant.

By the Court, HARRIS, J. I think the only facts necessary to the jurisdiction of the assessors are, in reference to real estate, that it be situated in the town or ward, and in reference to personal property, that the owner be an inhabitant of the town or ward. If the assessors should assume to assess lands lying in another town or ward, or to assess an inhabitant of another town, for personal property, though it might be situated in their town, the act of the assessors would unquestionably be void for want of jurisdiction. In this case, the lands assessed were situated within the town of Sand Lake. The assessors therefore had jurisdiction of the subject matter. In making the assessment, they performed a judicial act, in a matter within the limit of their authority. However much they may have erred in the performance of their duty, yet having jurisdiction of the subject matter, their error may be corrected in a court of review, but can not render their proceedings void. (*Bloom v. Burdick*, 1 *Hill*, 130. *Weaver v. Devendorf*, 3 *Denio*, 117. *Van Rensselaer v. Witbeck*, decided at the present term. (a) *Van Rensselaer v. Hand*, MS. opinion of Justice Wright, decided May term, 1849.) When the assessment roll is delivered to the supervisors, though uncorrected errors may appear upon its face, they are not authorized on that account to reject or disregard it, but it is the duty of the supervisors, notwithstanding such errors, to proceed to annex the tax list and issue their warrant for its collection. It is equally the duty of the collector to execute the warrant. Both will be protected in the discharge of this duty.

In the grants of lands in the manor of Rensselaerwyck, among other reservations, the original proprietor, as is well known, reserved to himself "all lands under water." These lands the

(a) *Post*, 133.

Van Rensselaer v. Cottrell.

assessors have, in the case before us, sought to subject to taxation. Whether they acted judiciously in doing so, is not a question involved in this decision. It is enough to justify the defendant, if we find that they did not transcend their jurisdiction.

The principal ground upon which the validity of the assessment is, in this instance, sought to be impeached is, that it appears, upon the face of the assessment itself, that some of the lands assessed were in fact *occupied* by other persons. I am inclined to think that this objection is not well taken in point of fact. The assessments are of "*lands under water*." In a majority of instances, the location of such land is merely given, but in other instances, it is described as land under water, *occupied* by some other person, whose name is given, for a saw mill or grist mill or some other kind of machinery. I think it quite obvious that it was the intention of the assessors, to distinguish between the land under water, and the water itself; and when they speak of land under water *occupied*, or *used*, (as it is sometimes expressed in the assessment roll,) as a mill privilege, it is merely intended to refer to the occupation or use of *the water*, as a mode of describing the land. It is to be kept in mind that the propriety of assessing a mill to its occupant and the land flowed by the dam of the mill to another person, as its owner, is not in question. The sole inquiry is whether the assessors exceeded their jurisdiction. But let it be assumed that the fair import of the terms used in the assessment is, that the thing assessed, the land under water, was occupied by the person named. In what respect, even then, have the assessors failed to comply with the requisitions of the statute? The *first* section of the act (1 R. S. 389) declares that the owner of lands, when he occupies them himself, or in case they are wholly unoccupied, shall be assessed for them, if he resides in the same town or ward. The *second* section provides for a case where the owner resides in the same town or ward in which the lands are situated, but the lands are occupied by another person. In that case, the assessors are not bound to ascertain who is the real owner. If they know who is the owner, he may be assessed for the lands;

Van Rensselaer v. Cottrell.

or they may assess the occupant as the owner. The third section declares that *unoccupied lands*, not owned by a person residing in the ward or town where the same are situated, shall be assessed in the manner subsequently provided in the same act. These subsequent provisions contain minute directions for assessing such unoccupied lands. They are found in the 12th and 13th sections of the act. The 4th subdivision of the 13th section directs the assessors, in case a part of a tract of land, which is to be assessed by them under the provisions of that section, shall be settled and occupied by a resident of the town or ward, to except such part from their assessment of the whole tract, and assess it as *other occupied lands are assessed*. In all these provisions, it will be perceived, no directions are given as to the manner of assessing *occupied lands* which are owned by persons who are not residents of the town or ward where they are situated. Such lands are clearly liable to taxation, (1 R. S. 387, § 1,) and as the legislature have omitted to prescribe the manner in which the assessment of such lands shall be made, I can see nothing irregular or improper in the mode of assessment adopted in this case. The assessors, having no statutory guide, have seen fit to specify both the owner and the occupant. Either, I think, would have been a sufficient compliance with the law. They might have regarded the occupant as owner, and assessed the lands as owned by a resident of the town, or they might, without noticing the occupant, have assessed them as lands of a non-resident owner. That they have specified who are the occupants, as well as the name of the owner, certainly can not vitiate the assessment. By the 5th section of the title relating to the collection of taxes, (1 R. S. 398,) it is provided, that if any person shall neglect or refuse to pay any tax which shall be assessed in any ward or town, *upon any estate of such person*, situated out of the ward or town in which he shall reside, and within the county, the collector may levy and collect such tax of the goods and chattels of the person assessed in any ward or town, within the county, in which he shall reside. Here then, we have the express authority of the collector. A tax had been assessed, and, as we have seen, regularly assessed,

Van Rensselaer *v.* Cottrell.

upon the lands of the plaintiff situated in Sand Lake. The plaintiff was a resident of Greenbush, another town within the county. The plaintiff had neglected or refused to pay the tax. These facts were sufficient to justify the collector in levying and collecting the tax of the plaintiff's goods and chattels.

The only other objection taken to the form of the assessment is, that, in some instances, the lands are not sufficiently described. Whether they are or not, I am unable to say. But if it were conceded that the description of some of the lands was imperfect, it is a matter with which the plaintiff has nothing to do. The only object of a minute description of the lands is, to secure the collection of the tax by recourse to the land, in case it should not otherwise be collected. If this should fail through defectiveness of the description, it might enure to the advantage of the owner, but could not work his injury.

The judge, at the circuit, held that the warrant alone was a sufficient protection to the defendant. In this I think he was right. But concede that he was wrong in holding that the warrant and assessment roll were to be considered as distinct instruments, having no dependence on each other, further than to ascertain the amount of the tax and the names of the persons assessed. This would not entitle the plaintiff to a new trial. There was no question of fact to be decided. The charge, taking it most unfavorably to the plaintiff, amounted to nothing more than directing a verdict for the defendant; and to this he was entitled. The assessment roll, as well as the warrant, were legal. Whether, therefore, they are to be considered as together constituting the process, under which the defendant acted, or whether the warrant alone constituted such process, is wholly immaterial. In either case, the process was valid, and the defence was sustained. The motion for a new trial must therefore be denied.

New trial denied.

SAME TERM. *Before the same Justices.*7b 133
11ap516

VAN RENSSALAER vs. WITBECK and SHARP.

The essential thing to be done by assessors, in the discharge of their official duty, is to determine who are to be taxed, and what property is taxable. This is a matter within their jurisdiction. In making the determination they act judicially; and, though they may proceed irregularly, yet, having jurisdiction of the subject matter, their decisions can not be questioned collaterally. *Per HARRIS, J.*

What provisions of the statute prescribing the duties of assessors, are merely directory in their character.

Those duties which, though required of the assessors, are not of the essence of the thing to be done, are not essential to the validity of the assessment. The certificate of the assessors, required by the 26th section of the statute relative to the assessment of taxes, is thus to be regarded.

The entire want of such certificate, much less the omission of the assessors to adopt the form prescribed in the statute, will not invalidate a tax charged by the board of supervisors upon the persons and property specified in the assessment roll, if the assessment itself is, in all respects, conformable to law.

No mere irregularity in the proceedings of assessors will justify the supervisors in omitting to annex the tax lists to the assessment rolls returned to them.

A failure to comply with the directions of the statute relative to the assessment of lands belonging to non-residents, is but an irregularity in a mere matter of form, in no way affecting the rights of any one, and therefore will not vitiate the assessment.

Requisites of the affidavit, authorized by the 15th section of the statute relating to the assessment of taxes, to be made by a person who seeks to reduce the amount of an assessment upon his personal estate.

THIS was an action of trespass for taking and disposing of personal property. It was tried at the Rensselaer circuit in February, 1849, before Justice HARRIS. It appeared upon the trial, that the defendant Sharp was collector of the town of Greenbush, and had taken the property in question, to satisfy a tax against the plaintiff. The defendant Witbeck was supervisor of the same town, and, as such supervisor, had signed the collector's warrant. The defendants, to justify the taking, gave in evidence the assessment roll of the town of Greenbush, for the year 1847, and the warrant, issued by the board of supervisors of the county, to the collector of Greenbush, for the

Van Rensselaer v. Witbeck.

collection of the taxes mentioned in the roll. To the warrant was annexed a copy of the assessment roll. By the terms of the warrant the collector was required "to collect from the several persons named in the assessment roll, annexed thereto, the several sums mentioned in the last column in each page thereof, opposite to their respective names." The assessment roll contained, first, the names of the taxable inhabitants residing in the town, arranged in alphabetical order, giving in columns opposite such persons' names the quantity and value of their real estate, the total amount of their real and personal estate, and the amount of tax assessed. In another part of the roll was inserted the assessment of the lands of non-residents, stating their names in alphabetical order, and giving in columns opposite each person's name, the quantity and value of his real estate, the total amount of his real estate, and the amount of tax assessed. Between these two classes of assessments were those against the plaintiff. They were as follows:

	Value.	Tax.
*Van Rensselaer, W. P., or occupant of		
Mansion house, 608 acres, - - - - -	\$17,000	\$73,10
Farm, McAuley, occupant, 208 acres, - - - - -	400	17,20
House and office, - - - - -	2,000	8,60
Store-house, - - - - -	150	66
House and lot, Dearstyne, occupant, - - - - -	150	66
Dock, - - - - -	500	2,15
	\$23,800	\$102,37

Amount of rents reserved in leases chargeable upon lands within the town of Greenbush, assessed according to an act passed May 13, 1846.

Van Rensselaer, W. P., bushels wheat, 192S 10lbs.	20,657
" Services and wood, 149 50	2,136
" Fowls, - - - 33 60	490
" Cash, - - - 217 50	2,300

25,571^v

Opposite which was carried out the tax assessed, amounting

Van Rensselaer v. Witbeck.

to \$109.96. Annexed to the assessment roll was a certificate signed by the assessors, as follows:

"We do severally certify that we have set down in the foregoing assessment roll, all the real estate situated in the town of Greenbush, according to our best information, and that we have estimated the value of the said real estate at the sums which a majority of the assessors have decided *to be proper*, and that the assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in said roll over and above the amount of debts due from such persons respectively, and excluding such stock as is otherwise taxable *according to the usual way of assessing*. Greenbush, August 30, 1847.

MARTIN DEFREEST,
BENJAMIN T. DENNISON,
GEORGE C. BARRINGER,
Assessors."

The plaintiff proved that in the fall of 1846, he removed from Greenbush, where he had previously resided, to the city of New-York, and had not since been a resident of Greenbush; that in August, 1847, his agent had appeared before the assessors, and stated to them, in the presence and hearing of the defendant Witbeck, that the plaintiff was not a resident of Greenbush, and presented to the assessors an affidavit in the words following: "Rensselaer County, ss. William P. Van Rensselaer, of the city and county of New-York, being duly sworn, says, that the value of the annual rents owned by him, liable to taxation, in the town of Greenbush, in said county, by the act entitled 'an act to equalize taxation,' passed the 13th day of May, 1846, will not exceed the sum of eleven thousand two hundred and eighty-eight dollars, after there shall be deducted from the same the just and true proportion of all his just debts that will remain unpaid, after all the personal property owned by him except that invested in the stock of incorporated companies liable to taxation, under the 12th chapter of the first part of the revised statutes, shall be applied to the payment of all his just debts, *said proportion so deducted being the amount of said debts, which,*

Van Rensselaer v. Witbeck.

if all his debts, except those to be paid, as before mentioned, by his personal property, were deducted from all his rents, would, by such deduction, be taken from the whole amount of his rents in said town. W. M. P. VAN RENSSELAER."

W.M. P. VAN RENSSELAER."

Sworn before me, this 14th day of August, 1847.

MARTIN D. DEFREEST.

The counsel for the plaintiff insisted that the assessment roll was illegal and void, and therefore that the warrant conferred no authority on the collector to take the plaintiff's property. The grounds upon which it was insisted that the assessment roll was illegal and void, were 1. Because the plaintiff was a non-resident of the town, which fact was known to the assessors and the defendants ; 2. That the assessment of the plaintiff's lands, in the manner specified in the assessment roll, was void, as an assessment of lands of a non-resident, because it was not made in conformity to the provisions and directions of the statute respecting the assessment of non-resident lands ; 3. That the assessment of the plaintiff for ground rents chargeable on land in Greenbush was illegal and void, because the assessors disregarded the affidavit made by the plaintiff and presented to the assessors, and refused to reduce the amount at which said ground rents were assessed by them, in conformity with the affidavit ; and 4. That the certificate of the assessors, attached to the assessment roll, was not, either in form or substance, such a certificate as is required by the 26th section of title 2, chapter 13, of the first part of the revised statutes, and was illegal and void on its face ; and that the warrant was no justification to the defendant for want of such a certificate as is required by the statute.

The judge decided that the warrant and assessment roll, and assessors' certificate, in connection with the evidence, were sufficient to protect the defendants from liability to the plaintiff in this action, and that the plaintiff was not entitled to recover, and therefore directed a nonsuit to be entered. The plaintiff's counsel excepted to the decision and direction, and moved for a new trial, upon a bill of exceptions.

Van Rensselaer v. Witbeck.

D. Buel, Jr. for the plaintiff.

D. L. Seymour, for the defendants.

By the Court, HARRIS, J. The first duty of assessors is, by diligent inquiry, to ascertain who are the taxable inhabitants, and what is the taxable property, within their respective towns or wards. Having done this, they are next to proceed to make, in a prescribed manner, an assessment roll. It is to contain four separate columns; in the *first* of which is to be inserted the names of all the taxable inhabitants; in the *second*, the *quantity* of land taxable to each inhabitant; in the *third*, the *full value* of such land; and in the *fourth*, the full value of all the taxable personal property. In another part of the same assessment roll, separate from the other assessments, they are to designate, in a particular manner, the lands of non-residents. The first direction is, that the land to be assessed shall be designated by its name, if it be known by one. The rule of valuation is also prescribed. When the assessment roll is completed, it is to be submitted to the examination of the inhabitants of the town or ward, for twenty days, at the expiration of which time the assessors are required to meet to review the assessment, upon the application of any person conceiving himself aggrieved. The assessors are then to sign the roll and attach thereto a certificate, the form of which is prescribed, and to deliver the roll, thus certified, to the supervisor. The essential thing to be done by the assessors is to determine who are to be taxed and what property is taxable. This is a matter within their jurisdiction. In making the determination they act judicially, and, though they may proceed irregularly, yet, having jurisdiction of the subject matter, their unreversed decisions can not be questioned collaterally. If, for example, some other rule of valuation than that prescribed by the statute should be adopted, or if the assessors should refuse to value the estate of any person liable to taxation, at the sum specified in the affidavit of such person, it might, perhaps, furnish ground for reversing the proceedings, but it would not be ground for holding the assessment void.

Van Rensselaer *v.* Witbeck.

upon a collateral question. (*Marchant v. Langworthy*, 6 *Hill*, 646.)

There are other provisions of the statute prescribing the duties of assessors, which are obviously directory in their character. Of this description, is the requirement in the 8th section, that the assessors shall ascertain between the first days of May and July who, and what property, is taxable, and the 19th section, requiring the assessors to complete their rolls on or before the first day of September, and the 27th section which requires the certified roll to be delivered to the supervisor of the town on or before the first day of October. These duties, though required, are not "of the essence of the thing to be done," and therefore, are not essential to the validity of the assessment. So, too, I think, the certificate required by the 26th section of the statute is to be regarded. If the assessors have performed their duty in making the assessment roll, as they may be presumed to have done, the certificate amounts to nothing more than a solemn declaration on their part, that they have performed such duty. It forms no part of their adjudication, upon which the action of the board of supervisors is to be taken. It is but the evidence of what the assessors have done, and therefore, it seems to me, would not, even in a direct proceeding, bringing in question the validity of the assessment, be the subject of review. At any rate, the entire want of such certificate, much less the omission of the assessors to adopt the form prescribed in the statute, could not invalidate a tax charged by the board of supervisors upon the persons and property specified in the assessment roll, if the assessment itself were in all respects conformable to law. The board of supervisors is required to examine the assessment rolls returned to them, for the single purpose of ascertaining whether the valuations of real estate in one town or ward, bear a just relation to those in the other towns or wards in the county, and if they do not, the board is authorized to change such valuation so as to produce such relation. It is also authorized to make any alterations in the description of the lands of non-residents, necessary to make such descriptions conformable to law. To these objects, the power of review,

Van Rensselaer *v.* Witbeck.

vested in the board of supervisors, is limited. Any other errors committed by the assessors in the discharge of their duty, it is not within the province of the board of supervisors to notice. The assessment rolls being returned to them, containing the names of the persons to be taxed, and the taxable property, and the assessors' valuation of such property, it is the duty of the supervisors, after having examined and corrected the valuations and the descriptions of the lands of non-residents, to proceed to annex the tax list. No mere irregularity in the proceedings of the assessors would justify the supervisors in omitting the discharge of this duty. That the assessors in this case were guilty of a gross departure from a duty plainly defined by the statute, is obvious. And yet, it is a matter within the knowledge of every one, at all acquainted with the manner in which the duty of assessors is discharged, that the certificate which the assessors, in this instance, annexed to the assessment roll prepared by them, was the only certificate which, as men of truth, they could subscribe. The law requires assessors to estimate all property liable to taxation at its full value, as they would appraise the same in payment of a just debt due from a solvent debtor. With this requirement of the statute before them, and acting under the obligation of their official oath, it is the uniform practice of assessors to estimate all real estate at a valuation greatly below its real value. There probably is not to be found a single instance in the state in which assessors have estimated the value of real estate according to the standard prescribed by the statute. The whole assessed value of the real estate liable to taxation throughout the state is, probably, less than half its real value. The real difference between the certificate before us, and that usually annexed to assessment rolls, is, that, in this case, the assessors have in fact stated the truth, while others, in following the form prescribed by the statute, have certified to what they must have known to be untrue.

It is also insisted that the assessment of the plaintiff's lands in Greenbush was illegal and void because they were assessed as the lands of a resident of the town, and not in conformity

Van Rensselaer *v.* Witbeck.

with the provisions of the statute relating to the assessment of the lands of non-residents. I am unable to perceive that this objection is founded in fact. It appears that the lands of the plaintiff are entered in the assessment roll by themselves, upon a page standing between the assessment of the taxable inhabitants of the town, and the assessment of the lands of non-residents. The plaintiff's lands are designated in the assessment roll, "in a part thereof separate from the other assessments," and this is all that the statute requires in this respect. I think, too, there is a substantial compliance with the statute in relation to description. As I understand the direction of the statute it is enough, when the land of a non-resident is known by a name, to enter it in the assessment roll by such name, and then to set down in two other columns the quantity and valuation of the land assessed. This was done in respect to each parcel of the plaintiff's land. But a conclusive answer to the objection is, that these directions are given with a view to the convenience of the officers engaged in the collection of taxes, and with reference to the probability that a sale of the lands may be necessary. To the owner it is a matter of indifference whether his lands are assessed as the lands of a resident or a non-resident, or whether they are described in the particular manner specified or not. His rights are not affected by the observance or the non-observance of the regulations of the statute. In either case, the amount of the tax with which he is chargeable is the same. A failure to comply with either of these directions of the statute would be but an irregularity in a mere matter of form, in no way affecting the rights of any body, and therefore would not vitiate the assessment.

The distinction between such irregularities as affect the validity of an assessment, and those which do not, is considered in the case of *Torrey v. Millbury*, (21 *Pick.* 64.) That was an action by a tax-payer to recover back money paid upon a warrant of distress for a tax, upon the ground that the tax was illegally and irregularly assessed. The statute of Massachusetts requires the assessors, in making out their list, to set down in distinct columns "the true value of real estate," and "the

Van Rensselaer v. Witbeck.

reduced value of real estate." In the case before the court the assessors had omitted to comply with this requirement, and had inserted in their list but one column which was headed "value." The question was whether this irregularity rendered the assessment void, so that each person taxed might take advantage of it and recover back the money he had paid. It was held that a compliance with the requirement of the statute in respect to distinct columns for the true and the reduced value of the lands assessed, was not a condition precedent to the validity of the tax, but was to be regarded as merely directory. Shaw, Ch. J., in delivering the opinion of the court, says, "In considering the various statutes regulating the assessment of taxes and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures, which are intended for the security of the citizen, for securing an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls, and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, the compliance or non-compliance with which does, in no respect, affect the rights of tax-paying citizens. These may be considered directory. Officers may be liable to legal animadversion, perhaps to punishment, for not observing them. But yet their observance is not a condition precedent to the validity of the tax."

In *Bloom v. Burdick*, (1 Hill, 130,) the same distinction is well stated. A surrogate had granted administration upon an estate, without taking a proper bond. The statute required that officer, upon granting administration, to take sufficient bonds, &c. with *two or more* competent sureties. He had taken

Van Rensselaer v. Witbeck.

a bond with but one surety. Bronson, J. said, "the duty of the surrogate is plain, but the omission to take *two or more sureties*, is not a matter which goes to the foundation of the proceeding, so as to render the letters of administration void. Only two things were essential to the jurisdiction of the surrogate, in granting administration, to wit, the death of the intestate, and the fact that at or immediately previous to his death, he was an inhabitant of the same county with the surrogate. If those facts existed, the surrogate had authority to act, and the omission to take a proper bond, was an error to be corrected on appeal, and not a defect of jurisdiction which would render the whole proceeding void." (See also *Weaver v. Devendorf*, 3 *Denio*, 117; *Williams v. Holden*, 4 *Wend.* 223; *Van Rensselaer v. Cottrell*, decided at the present term. (a)

The only other ground upon which it is contended that the assessment is illegal is, that the assessors disregarded the plaintiff's affidavit, and refused to reduce the amount at which his ground rents were assessed. By the 15th section of the statute relating to the assessment of taxes, it is provided that any person whose personal estate is liable to taxation may make an affidavit that the value of his personal estate after deducting his just debts, &c. does not exceed a certain sum, and in such case it is made the duty of the assessors to value such personal estate at the sum specified. Whether this provision can be made applicable to the assessment of rents under the act of 1846 I do not propose now to consider. If it be assumed that it is thus applicable, the slightest reference to the plaintiff's affidavit will be sufficient to show, that he has in no respect brought himself within that provision, so as to require the assessors to reduce the amount of his assessment. It is not entirely clear what it was intended the affidavit should express; but if I have been able to understand its import, it is, that after applying all the personal estate of the plaintiff, except his rents, to the payment of his debts, a large amount would remain unpaid; and if his rents in Greenbush should be charged

The Bank of Vergennes *v.* Cameron.

with the same proportion of such unpaid balance of debts, as his rents in other towns, it would reduce the value of such rents to the amount specified in the affidavit. It can not be necessary to do more than refer to the complicated terms of the affidavit to make it apparent that it is in no respect conformable to the provisions of the section of the statute under which it is sought to give it effect. The assessors were therefore clearly right in disregarding it.

Having come to the conclusion that none of the objections to the validity of the assessment roll are well founded, it becomes unnecessary to consider the other questions discussed upon the argument. The assessment being valid, the supervisors were bound to issue their warrant to the collector, and for what he has done that warrant was a full justification. The nonsuit was therefore properly granted, and the motion for a new trial must be denied.

New trial denied.

SAME TERM. *Before the same Justices.*
Wright, Kerris & Watson, Jr.
THE BANK OF VERGENNES *vs.* CAMERON and others.

To fix the liability of an indorser of an accepted bill, it is necessary that the holder should, at the proper time, present it to the acceptor, or at the place of payment, and demand its payment.

Presentment and demand, as well as due notice of non-payment, are conditions precedent to the liability of the drawer and indorser.

The acceptor has a right to see the bill, before he determines whether he will pay it or not. And if he pays it, he has a right to have it delivered to him, as a voucher in his settlement with the drawer.

The fact of presentment need not appear in the protest, *in verbo*, but the statement in the protest must, *ex vi termini*, import that when the notary made the demand of payment, he had the draft with him, ready to be delivered up, in case of payment.

Where a notary states in his certificate of protest, that he went with the draft to the bank at which it was payable, and demanded payment, this will be deemed

The Bank of Vergennes *v.* Cameron.

equivalent to saying that when he made the demand he had the draft with him, and was prepared, in case of payment, to surrender it to the person who should honor the draft on behalf of the acceptor; and the evidence furnished by such certificate is sufficient.

A memorandum at the foot of a draft, made by a notary and signed with his initials, stating the protest, and the mailing of notices directed to the drawer and indorsers, constitutes no part of the official certificate of the notary, and is not legal evidence of the service of notices of non-payment, upon the drawer and indorsers.

Nor is the fact that an indorser, shortly after the draft becomes due, exhibits a notice of protest which he has just taken from the post office, evidence of due notice to the indorsers.

The admission, by one of two partners who have indorsed a draft in the name of the firm, that the draft had been duly protested, will not, if made after the dissolution of the partnership, be allowed to have the effect of proving notice, as against the other indorser.

In an action against an indorser of a bill of exchange, he may prove that the bill was discounted for the acceptor, and that the name of the indorser's firm was put upon the same by his copartner, as an accommodation indorsement, without the knowledge or consent of the defendant.

The fact that the drawer has the draft in his hands, with the indorsement of a firm upon it, is sufficient to charge the person discounting the same with notice that it is a mere accommodation indorsement.

If a person discounting a draft is apprised by the circumstances under which the same is presented to him that the name of a copartnership firm indorsed upon it, had not been indorsed in the usual course of business, this is sufficient to impose upon him the necessity of ascertaining, before he receives it, whether the firm name has been put upon it by proper authority. And if he omits to make such inquiry, he takes the draft at the risk of establishing such authority.

If a draft, discounted under such circumstances, is subsequently transferred, in the ordinary course of business, to a bona fide holder for a valuable consideration, without notice, who sues thereon, the defence that it was indorsed in the copartnership name without the consent of the defendant, can not be sustained.

But upon showing, in such an action, that the indorsement was made for the accommodation of the drawer or acceptor, and without the authority of the defendant, and that the person discounting the same was chargeable with notice of those facts, the burden will be thrown upon the plaintiff, to show that he received the draft under circumstances which would shut out the defense.

MOTION for a new trial. This was an action of assumpsit, tried at the Rensselaer circuit, in November, 1846, before PARKER, circuit judge. The plaintiffs gave in evidence a draft for \$1000, dated Troy, July 2, 1845, drawn by Peter Comstock, upon Allen Comstock, Burlington, Vt., payable twenty-five days

The Bank of Vergennes v. Cameron.

after date to the order of Baker & Cameron, by whom it was indorsed. The draft was accepted payable at the Bank of Burlington. Cameron alone defended the suit. It was proved, upon the trial, that at the time the draft was made, Baker and Cameron were partners in the grocery business in the city of Troy, and that the indorsement of their partnership name upon the draft was made by Baker. The draft was discounted by Moses W. Scott. He testified that he discounted it for the *drawer*, from whom he received it, and that before it became due he transferred it to his brother. To prove the protest of the draft for non-payment, the plaintiff offered in evidence a certificate of a notary, residing at Burlington, annexed to the draft, in which he stated that on the 30th day of July, 1845, he "went with the annexed draft of Peter Comstock on Allen Comstock, for \$1000, to said bank and demanded payment thereof which was refused." At the foot of the draft was a memorandum in the following words: "Protested July 30, 1845, and mailed notice for drawer, directed to Port Kent, for first indorser to Troy, New-York, and for last indorser to Vergennes, Vt., W. F. G., N. P." Scott further testified that Cameron showed him the notice of protest the day he took it out of the post office, which was within three days after the draft fell due. He also testified that he saw a notice of the dissolution of the partnership of Baker & Cameron published in the forepart of August, 1845. The counsel for the defendant objected to the admission of the certificate of the notary as evidence to prove the presentation and protesting of the draft and notice of its non-payment to the indorsers. The court overruled the objection and allowed the draft and certificate to be read; to which decision the counsel for the defendant excepted. It was also proved that the other defendant signed a *cognovit*, to be used only in case all the parties should sign it.

The plaintiffs having rested, the counsel for the defendant Cameron moved for a nonsuit, on the ground that there was no evidence of the presentation of the draft for payment, at the Bank of Burlington, or of notice of protest to the defendant Cameron. The court denied the motion, and the defendant's counsel excepted. The defendants' counsel then offered to

The Bank of Vergennes *v.* Cameron.

prove that the draft was discounted for Comstock, *the acceptor*, and that the name of the firm of Baker & Cameron was put upon it by Baker, one of the partners, as an accommodation indorsement, without the knowledge or assent of the defendant Cameron; but the court overruled and excluded the evidence, and the defendant's counsel excepted. The jury thereupon, under the charge of the court, rendered a verdict for the plaintiff for the amount of the draft with interest.

J. Pierson, for the plaintiff.

D. L. Seymour, for the defendant Cameron.

By the Court, HARRIS, J. To fix the liability of an indorser of an accepted bill, it is necessary that the holder should, at the proper time, present it to the acceptor, or at the place of payment, and demand its payment. Presentment and demand, as well as due notice of non-payment, are conditions precedent to the liability of the drawer and indorser. The acceptor has a right to see the bill before he determines whether he will pay it or not; and if he pays it, he has a right to have it delivered to him as a voucher in his settlement with the drawer. (*Chitty on Bills*, 7th Am. ed. 216. *Story on Bills*, § 325. *Fall River Union Bank v. Willard*, 5 Metc. 216. *Musson v. Lake*, 4 *Howard's U. S. Rep.* 262.) The usual form of the notarial certificate is that the notary, "did exhibit the bill" to the acceptor and demand payment, &c. (See *Story on Bills*, § 302, note 2.) In this case the notary certifies that he went with the draft to the bank, and demanded payment. Do these terms fairly import that the notary, at the time of demanding payment, presented the draft? If they do, I think the certificate sufficient in this respect. If not, the plaintiff's have failed to furnish legal evidence of the performance of one of the conditions upon which the defendant's liability depended. *Musson v. Lake*, above cited, is a strong case in favor of the position of the defendant's counsel that the protest does not furnish sufficient evidence of actual presentment. "The protest," says Justice McKinley, who delivered the opinion of a majority of

The Bank of Vergennes v. Cameron.

the court, "should set forth the presentment of the bill, the demand of payment, and the answer of the acceptor. The law makes the notary the agent of the holder for the purpose of presenting the bill, and doing whatever the holder is bound to do, to fix the liability of the indorser. Every thing, therefore, that he does in the performance of this duty, must appear distinctly in his protest. If it fails to make full proof of due diligence on the part of the plaintiff it must be rejected." In that case the notary certified that at the request of the Union Bank, holder of the original draft, of which a true copy was on the reverse of the protest, he *demanded payment of said draft* at the counting house of the acceptors, and was answered by Mr. Kirkman, one of the firm, that the same could not be paid. There was nothing in the bill which furnished evidence that the notary even had the draft with him when he demanded payment. It was therefore held, that the protest ought not to have been received as evidence of presentment. But even in that case, Mr. Justice McLean thought that as the notary could not make a legal demand in the absence of the bill, the fair if not the necessary inference was, that *he had possession* of the bill when he demanded payment. And Mr. Justice Woodbury thought the protest was competent evidence to be submitted to the jury, in order that they might infer from it that the draft was presented when the demand was made. I think the extent of the doctrine established by the authorities upon this subject is, not that the fact of presentment must necessarily appear in the protest, *in verbo*, but that the statement in the protest must, *ex verbis*, import, that when he made the demand of payment, the notary had the draft with him, ready to be delivered up, in case of payment.

In this case, the notary states that he went with the draft to the bank, and demanded payment. The language, I think, may fairly be deemed equivalent to saying that when he made the demand he had the draft with him and was prepared, in case of payment, to surrender it to the person who should honor the draft on behalf of the acceptor. So far, therefore, as it relates to the presentment of the draft, and the demand of pay-

The Bank of Vergennes v. Cameron.

ment, I am inclined to hold that the evidence furnished by the notarial certificate is sufficient.

But in respect to notice of non-payment, the proof was clearly insufficient; or rather, there was no legal evidence at all. Notice to the drawer or indorser is, by the law merchant, no part of the official duty of the notary. His certificate of such notice is, therefore, not legal evidence of the fact, except when so declared by statute. In this state we have such a statute, declaring that in all actions at law, the certificate of a notary, under his hand and seal of office, stating the service of notice, &c. shall be presumptive evidence of the facts contained in such certificate. (*Sess. Laws, 1833, p. 395, § 8.*) It was held in *The Bank of Rochester v. Gray*, (2 *Hill*, 227,) that this statute is only applicable to notaries of this state. The position is assumed by Mr. Justice Cowen, without argument or authority. "It is scarcely necessary to observe," says he, at the conclusion of his discussion of the other questions in the case, "that our statute relative to proof of notice by certificate, applies to none others than notaries of this state." This may be so, but I confess I am unable to see by what rule of construction this conclusion is rendered so obvious. On the contrary, it seems to me that the legislature intended to make the statute applicable to all notarial certificates. I find nothing in the language, or object of the act, which requires or justifies the restriction of its operation to the certificates of notaries of this state. But it is unnecessary, in this case, either to affirm or overrule that decision. The certificate in this case makes no mention of the service of notice of protest. The only allusion to such notice is in the memorandum at the foot of the draft, and it is not pretended that this memorandum was made evidence. It constitutes no part of the official certificate of the notary.

Nor do I think the fact that Cameron, within three days after the draft became due, exhibited to the witness Scott a notice of protest which he had that day taken from the post office, can be regarded as evidence of due notice to the indorsers. Notice of non-payment was a condition precedent to the plaintiff's right to recover. To be effectual, such notice must have been given

The Bank of Vergennes v. Cameron.

at a particular time and in a particular manner. The indorser has a right to insist upon strict proof of due notice. In *Smedes v. The Utica Bank*, (20 John. 372,) the indorser of the note in question was J. C. Spencer, who resided in the same village where the note was payable. It was proved by an agent of the notary, by whom the note was protested, that in the evening of the same day he either put a notice of protest for Mr. Spencer into the post office or delivered it at his office ; that he had no recollection of ever having left at the post office a notice for a resident of the village, and he believed the notice was left at Mr. Spencer's office. A clerk in Mr. Spencer's office saw the notice in his office the day the note was protested. It was held that, though there was a strong presumption that the notice was left at the indorser's office, the fact was left in doubt ; that nothing short of clear proof of legal notice would subject the indorser to liability, and therefore the proof was insufficient. "The question is not," say the court, "what inference the jury might draw, but it is, what testimony does the law require." So, in this case, there may be little reason to doubt that due notice was given, but the plaintiffs have failed to give clear and explicit evidence that such was the fact, and the liability of the defendant as indorser is not to depend upon any mere inference or presumption.

The admission of Baker, in March, 1846, that the draft had been duly protested, though it may have been proper, when the evidence was offered, to receive it, can not be allowed to have the effect of proving notice, as against Cameron ; for it was subsequently proved that the partnership between Baker and Cameron had been dissolved before such admission was made. Nor can Cameron be affected by what was said by Baker to the witness Scott. It is true that Baker told Scott the draft should be paid ; that he would see Comstock and do all in his power to have it paid, yet, conceding that it amounts to a direct promise by Baker, on behalf of the firm, to pay the draft, which is certainly more than the terms used necessarily import, it does not appear in which of the two interviews between the parties

The Bank of Vergennes v. Cameron.

the promise was made, or whether it was before or after the dissolution of the partnership between Baker and Cameron.

I think, therefore, the motion for a nonsuit should have been granted, upon the ground that there was no sufficient evidence of notice of the protest of the draft, or of any waiver of the defendant's right to insist upon strict proof of such notice. For this reason a new trial must be granted. But as it is probable that, upon another trial, this defect in the proof may be supplied, it may be useful to consider the remaining question presented by the bill of exceptions.

The defendant offered to prove that the draft was discounted for the acceptor, and that the name of the firm of Baker & Cameron was put upon the draft by Baker, one of the partners, as an accommodation indorsement, without the knowledge or assent of the defendant Cameron. I think this evidence should have been received. Scott received the draft from Peter Comstock the drawer. Whether it was discounted for him, or for the acceptor, is quite immaterial. The fact that the drawer had the draft in his hands, with the indorsement of Baker & Cameron upon it, is sufficient to charge Scott, who discounted the draft, with notice that it was a mere accommodation indorsement. He was apprised by the circumstances under which the draft was presented to him, that the name of the defendants' firm had not been indorsed upon it in the usual course of business. This was sufficient to impose upon him the necessity of ascertaining, before he received it, whether the firm name of Baker & Cameron had been put upon it by proper authority. Having omitted to make such inquiry, he took the draft at the risk of establishing such authority. He could not protect himself upon the ground that he received the paper in ignorance of the want of Baker's authority to use the name of his partnership in making the indorsement. The rule is just and practical, and is firmly settled by authority. (*Stall v. Catskill Bank*, 18 *Wend.* 477, and cases there cited.) Assuming, then, that Cameron did not assent to the use of his name as an indorser of the draft, Scott must be regarded as having received it, knowing that such assent had not been given. Had he retained the

The Bank of Vergennes v. Cameron.

draft, therefore, he clearly could not have enforced it against Cameron as a bona fide holder. But holding the draft as an indorsee, though himself chargeable with notice of the circumstances under which the indorsement was made, if he had transferred it, in the ordinary course of business, to a bona fide holder, for a valuable consideration, without notice of the facts which would deprive him of the right of protection as a bona fide holder of the indorsement, the legal presumption being that he had received it from the indorsers in the transaction of their business, the defense here interposed could not be sustained. Then Cameron, as against such bona fide holder, would be bound by the indorsement of the firm name by his partner, though made against his will or without his knowledge. But the difficulty in the plaintiffs' case is, that they have not shown a better right to hold the indorsement against Cameron than Scott himself had. Scott says he transferred the draft to his brother before it became due, but under what circumstances does not appear; nor does it appear how the plaintiffs became the holders of the draft. There is nothing in the facts proved inconsistent with the supposition that Scott made the transfer to his brother merely for the purpose of collection, and that the plaintiffs received it for the same purpose. Upon showing that the indorsement was made for the accommodation of the drawee or acceptor, and without the authority of Cameron, and that Scott was chargeable with notice of these facts, the burden would have been thrown upon the plaintiffs to show that they received the draft under circumstances which would shut out the defense. (*Stall v. Catskill Bank, above cited. Munro v. Cooper, 5 Pick. 412. Bank of St. Albans v. Gilliland, 23 Wend. 311. Joyce v. Williams, 14 Id. 141.*) I am of opinion, therefore, that the evidence offered by the defendant at the circuit should have been received, and that for this reason also a new trial should be granted.

New trial granted.

ONEIDA GENERAL TERM. September, 1849. *C. Gray, Pratt, Gridley, and Allen, Justices.*

BLISS and others, executors of Sheldon, appellants, *vs.* SHELTON, respondent.

Under the third subdivision of the first section of the title of the revised statutes respecting surrogates' courts, a surrogate has plenary power to control the conduct of executors and administrators.

The words of the subdivision are directly applicable to a case in which an executor persists in exercising the functions and discharging the duties of his trust erroneously, or irregularly. And any person who suffers an injury by the erroneous action of an executor, in his proceedings in the surrogate's office, may lawfully call upon the surrogate to control his conduct. *Per GRIDLEY, J.* If executors have filed an inventory of the personal estate of their testator, without setting off any part of the property to the widow, as exempt articles under the provisions of the revised statutes or of the act of 1842, and have converted into money all the articles contained in the inventory, the surrogate has the power to order them to pay to the widow a sum of money, in lieu of what she was entitled to receive under the exemption laws.

The surrogate has the power to decide upon, and direct, the allowance of any sum, within the limit (of \$150) prescribed by the statute. And where it does not appear that he has exceeded his jurisdictional power, the exercise of his judicial discretion will not be revised, on appeal.

Where a man, in contemplation of marriage, agrees to make a settlement on his wife, upon his death, in consideration of which she agrees to relinquish her rights in his property after his decease, and he dies without having made the settlement, the widow is not barred of any rights which she might have asserted if no such agreement had been executed.

She may therefore claim the exempt articles of personal property given to a widow by the statute.

What amounts to evidence of an election by a widow to abide by an ante-nuptial agreement; and how far such an election, if made, is binding upon her.

APPEAL from an order of the surrogate of the county of Oneida. The facts are stated in the opinion of the court, and need not be repeated.

T. H. Flandrau, for the appellants.

S. B. Garvin, for the respondent.

Bliss v. Sheldon.

By the Court, GRIDLEY, J. This is an appeal from an order made by the surrogate of Oneida county, upon an application by the respondent to control the conduct of the executors of her husband's estate, in relation to the inventory which they had filed. They had filed an inventory without setting off any part of the property inventoried, to the widow, as exempt articles, under the provisions of the revised statutes, or of the act of 1842. It appeared before the surrogate that the executors had disposed of, and converted into money, all the articles contained in the inventory, and the surrogate therefore ordered them to pay to the widow the sum of \$150 in lieu of what she would be entitled to receive under the aforesaid exemption laws. The executors have appealed from the decree of the surrogate, and on the appeal have raised several questions which we propose to consider in their order.

I. It is suggested here, for the first time, that the surrogate had no jurisdiction to entertain the application and to make the decree. The powers conferred upon the surrogate are enumerated in the first section of the first title of chapter second, part third, of the revised statutes. (2 R. S. 154.) Among these powers we find the following: Subd. 3d. To direct and control the conduct, and settle the accounts of executors and administrators; subd. 6th. To administer justice in all matters relating to the affairs of deceased persons.

Now under the third subdivision the surrogate has plenary power to control the conduct of executors and administrators. The words are *general*, and would seem to be directly applicable to a case in which an executor persists in exercising the functions and discharging the duties of his trust erroneously, or irregularly. And any person who suffers an injury by the erroneous action of the executor in his proceedings in the surrogate's office, may lawfully call upon the surrogate to control his conduct. If, in making out an inventory, the executors should adopt an erroneous principle, it seems to us that he may be controlled by the surrogate. In the case before us, assuming that there should have been set off to the widow a certain portion of the inventory, which by law is not regarded as assets,

Bliss v. Sheldon.

and which the executors should not dispose of as such, it is difficult to say that the case does not fall directly within the spirit as well as the words of the statute. The inventory contained an item of \$175 in bank bills, which, or some part of which, the executors might have set apart to the use of the widow. Now, granting that the executor ought to have done this, but erroneously omitted to do it, we can see no assumption of an unauthorized power in the surrogate in decreeing that it should now be done. The order appealed from does *this*, and *no more*. It merely orders the executors to pay over \$150, in lieu of the exempted property, which might have been, so much of the \$175, the only part of the inventoried property which had not been disposed of. In doing this it is true that the surrogate has in effect decided between the conflicting claims of the executors, who represent the next of kin and the legatees, and the widow; but by the sixth subdivision of the section before cited, the surrogate has the power to administer justice in matters of this nature. We are therefore of the opinion that the surrogate had the power to make the order in question.

II. It is suggested that the order is erroneous in awarding too large an amount. By the second section of the act of 1842, (*chap. 157.*) the amount of property set apart for the widow, might have been \$150. And it is laid down in Dayton's Surrogate, that it is the *duty* of the executor to set apart for the widow, articles to the amount of \$150, and that the discretion vested in the appraisers, by the act, has no reference to the amount in value of the articles set apart, but only to the particular articles to be selected from the inventory. But whether this be the true construction of the act or not, we think that the surrogate had, from the very nature of the case, the power to decide upon and to direct the allowance of any sum within the limit prescribed by the statute. We would not revise his judicial discretion when it does not appear that he has exceeded his jurisdictional power.

III. The principal question involved in this appeal arises upon the effect of the ante-nuptial agreement executed by the respondent and her deceased husband, shortly previous to the

Bliss v. Sheldon.

celebration of their marriage. That agreement recited that a marriage was contemplated between the parties; and then proceeds to state that the deceased covenanted and agreed to and with the respondent, that if the intended marriage should take effect, and in the event of his death before that of the respondent, he would, *by his last will and testament in writing, or otherwise*, give and assure unto the respondent the sum of fifty dollars yearly, each and every year during her natural life; and the use and occupation of one square room and bedroom adjoining the same in the south part of his dwelling house, and a garden spot on the premises, and all the household furniture which the respondent should have and bring with her at her marriage. The agreement then proceeds as follows: "The above grant is to be received in lieu of dower or any other portion of the said Ebenezer Sheldon's property after his decease."

The counsel for the appellants has submitted a very able and learned argument to show that this ante-nuptial agreement operated as a legal bar to the respondent's right to the exempt articles given to the widow by the statute. In the view which I have taken of this case, it is not necessary to question this proposition. The agreement may be admitted to be a valid contract, and binding on both parties. But it clearly is an instrument by which the relinquishment by the respondent of her right in the property of the deceased, would depend upon the performance by him of the covenants, into which he had entered on his part. It was not the executory covenant of the deceased which was to be in lieu of dower, but it was the grant or assurance, conveying to her as a vested right, her annuity, and a life estate in the house and garden and a title to the household furniture. When a man in contemplation of marriage agrees to make a settlement on his wife, in consideration of which she agrees to relinquish her rights in his property at his decease, and he fails to make the settlement, the widow is not barred of any right which she might have asserted, if no such agreement had been executed. (See *Clancy's Rights of Married Women*, p. 103.) The case now under consideration is not to be distinguished in principle from that. The deceased did not per-

Bliss v. Sheldon.

form his covenant. He made his will by which he provided for the payment of her annuity of fifty dollars, not *for life*, but only while she *should remain his widow*. The residue of his covenant was wholly unperformed; and by disposing of the entire remainder of his property, he rendered it impossible for his executors to perform it; even if that would operate as a performance by himself. But it would not. When the deceased died without "giving and assuring" to his widow "the annuity for life," together with the real estate and furniture, which he had covenanted to do, she was released from all her engagements contained in the agreement, and that instrument thenceforth formed no bar to the rights she would otherwise possess.

It is said, however, that on the hearing before the surrogate the respondent admitted that she was in possession of certain property, under the contract, and that she is therefore estopped from denying that it is binding on her. This fact was charged in the petition of appeal, and the respondent answered that she had not sufficient information as to what was admitted on the hearing before the surrogate, to admit the fact as charged. The surrogate has returned, that it was admitted that the respondent lived in the house of the deceased, and had a small amount of property of her own, principally of that which she owned before her marriage; and that she claimed and was in possession of a part of the house and land, together with said personal property, under the ante-nuptial contract; to which claim the executors assented, though the exact quantity and location of the land to be set apart to her had not been agreed upon. Now there are many reasons why the surrogate was justified in holding that the respondent was not estopped from insisting on the invalidity of the agreement. (1.) It nowhere appears that she had any knowledge that the deceased had not by his will or otherwise assured to her the property he had contracted to give her. (2.) If she *did* know that he had not performed his part of the agreement, it does not appear that she was aware of her legal rights, and we think that the facts to which we shall hereafter advert render it quite certain that she was not. (3.) It is clear from the admission that the rooms

The Hamilton and Deansville Plank Road Co. v. Rice.

and garden spot have not yet been set off to her; and her possession of the small portion of personal property she brought there, and her residence in the house of the deceased, furnish no evidence of an election to abide by the agreement. (4.) Her election to abide by the agreement would be unavailing. The executors have no power to execute it on the part of the deceased. They can only execute the will, and that has disposed of the property, which was to have been assured to her, to certain devisees named therein. (5.) The *devisees* have no power to consent and authorize the executors as their agents to assure to the respondent the real and personal estate in question, because *four* of the parties interested in the devise are *infants*.

It follows that any election of the widow to take what was agreed to be settled on her, and to abide by the agreement, must of necessity be defeated by the impossibility that her rights under the agreement can be assured to her. If she has even so agreed, the considerations I have alluded to, show that she is entitled to her *locus penitentiae*, when it turns out that the other part of the agreement can not be performed.

The decree must be affirmed, with such costs as are given by the code.

Decree affirmed.

SAME TERM. *Before the same Justices.*

THE HAMILTON AND DEANSVILLE PLANK ROAD COMPANY
vs. RICE.

7b 157
171 NY 496

The assignor of a chose in action, which is assigned for the purpose of making him a witness, is not rendered incompetent to testify, by the provisions of the 352d section of the code of 1848, if he is not interested in the event of the suit. The rule is still the same as it previously stood at common law, viz. that in a suit by a corporation an owner of stock in the corporation may, by assignment, divest himself of all interest in the event of the suit, and thus become a competent witness.

The Hamilton and Deansville Plank Road Co. v. Rice.

In an action by a plank road corporation, against a stockholder, to recover the amount of calls made upon the stock held by him, the books of the corporation are admissible in evidence, to prove the resolutions calling for payment of the several installments upon the subscriptions for stock.

It is no objection to the validity of a subscription to the capital stock of a plank road company that it was made upon a separate paper, which only a portion of the stockholders had subscribed; there having been several similar papers used, in lieu of the *books* required by the act to be opened in different places, for subscriptions.

Nor is it any objection to the validity of such a subscription, or to the right of the company subsequently organized to maintain an action upon it, that, at the time it was made, there was no company in existence.

All the cases which have held subscriptions of stock void are based either upon the supposed want of necessary parties to the agreement; of a sufficient consideration to uphold it; or of a sufficient promise expressed in it. *Per Gardley, J.*

- ↖ In the case of moneys subscribed for charitable purposes—embracing donations for religious and literary institutions—it has been held that there is no necessity of a personal, pecuniary, benefit to be derived by the subscriber. But in the case of a manufacturing, or plank road, or turnpike, or money corporation, the rule is different. The advantage to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and when the agreement secures that advantage to the subscriber, the objection of a want of consideration can not be made, with success.
- ↖ Where an agreement, by which the parties thereto promise to take specified portions of stock in a proposed plank road company, not only bears upon its face the evidence of a consideration, founded on the pecuniary advantage of membership, but also upon the mutual promises of the several subscribers, such mutual promises constitute the consideration. And if the promise is to pay the subscriptions, to the corporation to be thereafter organized, the fact that the promise is to pay a third party, can not be successfully urged in defense to an action by the company, against a subscriber, to collect the calls upon his stock.
- ↖ Although an agreement, to take stock in a plank road company proposed to be organized under the general plank road act, contemplates a company whose capital stock shall be a specified sum, a subscription to the full amount named is not a condition precedent to the right of the company to recover upon such agreement.

And where a subscriber agreed to become a member of a proposed company, as soon as the amount of stock required by the plank road act should be subscribed, and to pay the amount of his subscription when the company should be organized; *Held* that as soon as stock to the amount of \$500 for every mile of the road was subscribed, and five per cent paid in, and the company organized, he was liable to be sued by the company for the installments due upon his subscription.

The Hamilton and Deansville Plank Road Co. v. Rice.

A subscription to the articles of association of a plank road company is not an act indispensable to membership in the company.

A subscription to any legal and valid instrument, by which a party engages to become a member of a company, when organized, and to pay a given sum, which is to be a part of the capital stock, followed up by an acceptance of a certificate for the stock, will make such subscriber a member of the corporation.

The acceptance of a stock certificate is a waiver of any informality that may have intervened, short of an absolute defect of jurisdiction.

And such acceptance of a certificate will lay a foundation for a recovery against the subscriber, by the company, for the amount of the stock subscribed, under a count for money paid.

When a *deviation* of the site of a plank road from the route prescribed in the articles of association, will be considered allowable, under a fair interpretation of the word "near," and as being within the discretion of the company.

THIS was an action of *assumpsit*, brought against the defendant upon his subscription for \$200 to the capital stock of the plaintiffs' company, to recover the amount of three several assessments made upon the stock owned by the defendant. The declaration contained four special counts, and a fifth consisting of the usual money counts condensed; to which was added a count upon an *insimil computassent*. The defendant pleaded the general issue, and gave notice of special matter. The cause was tried at the Madison circuit, in February, 1849, before Justice GRIDLEY; when a verdict was taken for the plaintiff, subject to the opinion of the court, upon a case.

Mr. Goodwin, for the plaintiffs.

J. B. Eldridge, for the defendant.

By the Court, GRIDLEY, J. This is an action to recover the amount of several calls, for installments upon a subscription for the stock of the company. The declaration contained the common counts in *indebitatus assumpsit*, and also several special counts, framed upon a subscription paper which was proved to be the paper used as a substitute for a book at one of the places, where the books for subscribing to the stock of the road were opened, pursuant to the notice contained in the first sec-

The Hamilton and Deansville Plank Road Co. v. Rice.

tion of the act providing for the incorporation of plank road companies. (*Sess. Laws of 1847*, p. 216.) By the terms of the instrument, the subscribers contracted and mutually agreed, each with the other, to form themselves into a company, for the purpose of constructing a plank road from the village of Hamilton to Deansville, by the way of Bouckville, Solsville and Oriskany Falls, to be known by the name of the "*Hamilton and Deansville Plank Road Company*," with a capital stock of twenty-six thousand dollars, the company to be organized according to the directions of the act, &c. as soon as the amount of stock required by the act could be subscribed. The paper then proceeds in the following words: "We the undersigned do severally agree, for and in consideration of the benefits to be derived from becoming members of said company, and of obtaining the benefits thereof, agree to pay to the said company when organized the several sums set opposite our names, to be paid to the directors of the company, for the purpose of constructing a plank road from Hamilton to Deansville, &c.; said subscriptions to be parts of the capital stock of said company. Hamilton, Dec. 13, 1847."

Upon the trial, the plaintiffs proved the subscriptions of the stock by the defendant and others, upon the opening of the books pursuant to notice duly given and published; the adoption and execution of the articles of association, signed by a large number of persons whose subscriptions amounted to considerably more than \$500 to the mile, and the payment of over five per cent on the amount so subscribed, and the filing of the articles, with the affidavit required by the first section of the act annexed, in the office of the secretary of state, in the month of January, 1848. It further appeared that after this the capital stock actually taken was increased to \$19,000, though it had never been filled to the amount of \$26,000, the sum named in the articles as the amount of capital stock of the corporation. The company, after its organization commenced operations, completed and filed its survey, and expended on the faith of the subscriptions a large amount of money. The defendant never signed the articles of association, but he was put down in the

The Hamilton and Deansville Plank Road Co. v. Rice.

books of the company as a stockholder to the amount of his subscription, and after the work had been commenced and considerable money expended, his certificate of stock was made out and delivered to him, and he accepted it. When afterwards called on for his five per cent, he at one time replied that he expected to sell his stock, to a person named by him, and on another occasion he said that it was not then convenient to pay it. The calls were duly proved, as well as the ultimate refusal of the defendant to pay for the stock. After one or two exceptions to the admission of evidence, it was agreed by the counsel that a verdict should be taken for the plaintiffs, subject to the opinion of the court on a case to be made, upon the points raised by the defendant on a motion for a nonsuit.

The exceptions taken to the admission of evidence, were probably waived by the agreement to allow a verdict to be taken subject to the opinion of the court. But, inasmuch as they would, if well founded, strike out of the case much of the ground on which the plaintiffs' right to recover rests, we will proceed to consider them. The first was an exception to the ruling of the court in admitting Philander Barker to be sworn as a witness. Barker had been a stockholder in the road, but some days before the trial he had transferred his stock and received a note for it, at the suggestion of the plaintiffs' attorney, without inquiring into the reason of the suggestion, and without any view of becoming a witness. The attorney, however, testified that it was his object in advising the transfer to make Barker a witness. Upon this evidence the counsel of the defendant objected to the competency of the witness, not on the ground that he was still interested; but on the ground that he was the assignor of a thing in action assigned for the purpose of making him a witness, under the provisions of section 352 of the code of 1848. The judge held, and we think correctly, that, if the witness was not interested, in the event of the suit, the provision in question did not render him incompetent. The section declares, not that such an assignor shall be incompetent, but merely that the 351st section shall not apply to him. The latter section provided that no person should be excluded by reason of his interest

The Hamilton and Deansville Plank Road Co. v. Rice.

in the event of the action. The true interpretation of the statute, therefore, is that a witness who has assigned a thing in action, for the purpose of being a witness, if he remain interested in the event of the suit, can not be examined as a witness. An interest in the event of the suit, was formerly a disqualification of a witness. The 351st section abolished that disqualification, as a general rule. But the 352d section excepted from the application of such general rule the case of an assignor who assigned his interest in the subject matter to become a witness. The case, therefore, is left as it stood at common law, and by the common law rule the owner of stock might, by assignment, divest himself of all interest in the event of the suit; and become a competent witness.

In a subsequent stage of the suit the plaintiff offered the books of the company in evidence, to prove the resolution calling for payment of the several installments upon the subscriptions for stock. To this evidence the defendant objected. The court admitted the books, to show that the corporation had taken the requisite steps to make the defendant liable, and to the admission of the books for that purpose there was no further objection. Those decisions at the circuit we believe to be correct. We come now to the consideration of the grounds on which the defendant moved for a nonsuit, and upon which he now claims that he is entitled to judgment. The grounds stated by the defendant are eight in number; but they may be embraced in two general propositions.

I. That the agreement which the defendant signed was void, for the reason that it was executed before there was any company in existence. That it purports to be an agreement between the original signers alone; and can not be extended by parol evidence; that it was not mutual, the company not being bound by it; that it does not run to the company.

On the particular paper to which the signature of the defendant was attached, there were only the names of ten subscribers. But this paper was only one of the several books which were opened pursuant to notice, under the act; and the defendant's counsel insists upon too narrow and technical a view of the

The Hamilton and Deansville Plank Road Co. v. Rice.

contract when he seeks to construe it as an agreement that the signers of *that paper* alone should constitute the contemplated company. The defendant is chargeable with a knowledge of the provisions of the act, and he therefore was bound to know that the books were opened at other places on the route, and that the number of stockholders was not confined to such as should subscribe, either one or all of the books opened for subscription, or to those who should sign the articles of association, but that the number might be increased, after the filing of the articles, until the entire amount of the capital stock should be subscribed. It has been said that this subscription paper is not a book. (True, it is not literally a book; but it has served the purpose of one, and the rights of the corporation can not depend on the fact, that, when the books, in the language of the act, were opened for subscription, and the subscribers placed their names to an instrument stating the objects and conditions of the subscription, such instrument was written on a single sheet instead of a sheet bound up with a hundred others. The argument, therefore, which is founded on this technical view of the agreement, must be rejected as hypercritical.) We think, too, that the fact that the corporation was not *in esse* when the agreement was signed, is not, of itself, a sound objection to the right of maintaining an action upon it. This point is decided in the case of *Stanton, President of the Exchange Bank, v. Wilson*, (2 *Hill*, 153.) In that case the defendant signed the articles of association, and subscribed before the organization of the corporation, but the court held that this fact formed no objection to a recovery. The action was brought in the name of the president, and the court say, "It is true the company did not come into existence till several months after the defendant's subscription purports to have been made, and the power of the president to sue did not arise till that time. The contract, though dated before, must be considered as taking effect only on the first of January." In that case there was no corporation *in esse*, to be *bound by*, or *to exact obedience to*, the agreement which the defendant subscribed, at the time when he placed his signature to the paper. Another case which is decisive upon

The Hamilton and Deansville Plank Road Co. v. Rice.

this point, is that of *The Trustees of Farmington Academy v. Allen*, (14 Mass. Rep. 172.) The defendant, with others, signed a paper, reciting that an academy in Farmington was rendered necessary by reason of the distance of that town from other institutions of the kind, and that it was also necessary to raise funds before the necessary assistance from the legislature could be obtained ; therefore the subscribers agreed to pay such sums as they should subscribe, to the persons to be appointed trustees by the legislature. The defendant, having paid a part of his subscription, and the trustees having gone on to make expenditures, and subsequently the defendant refusing to pay the residue of his subscription, was sued, and the suit was held to be well brought, and a verdict was sustained notwithstanding there was no corporation *in esse* when the promise was made.

All the grounds of objection arising under the propositions we are now considering, are based on the supposed want of sufficient parties to the agreement, or of a sufficient consideration to uphold it, or of a sufficient promise expressed in it. All the cases which have held subscriptions of stock void, have gone upon one or the other of these grounds. The case of *The New Bedford Turnpike Company v. Adams*, (8 Mass. Rep. 138,) where there was a mere subscription for stock, without any promise to pay, and the only remedy provided by the act of incorporation being the forfeiture of the stock, was placed on the distinct ground that there was no obligation to pay created by the subscription, and there being no promise, that the act contemplated a forfeiture only. In the *Essex Turnpike Co. v. Collins*, (8 Mass. Rep. 292,) a corporation had been organized to construct a road from a certain point to Boston ; and a certain person named Foster, procured the defendant to subscribe a paper to pay a certain sum, with the view of having the road extended to Salem ; and although there was evidence that the directors met, afterwards, and resolved to extend the road to Salem, yet there was no proof that Foster was the agent of the company, or that the company had any knowledge of his acts. The agreement was held void for want of either parties or consideration. The case of the *Phillips Limerick Academy v. Davis*,

The Hamilton and Deansville Plank Road Co. v. Rice.

(11 *Mass. Rep.* 113,) was another case in which the court held that there was no sufficient consideration. It is indispensable to a consideration that there should be either some advantage to be enjoyed by the promiser, or some damage or loss incurred by the promisee. In the case of moneys subscribed for charitable purposes, which embrace donations for religious and literary institutions, it has been held that there is no necessity of a personal pecuniary benefit to be derived by the subscriber; but in the case of a manufacturing, or plank road, or turnpike, or money corporation, the rule is very different. The advantages to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and when the agreement secures that advantage to the subscriber, on the organization of the company, the objection of a want of consideration can not be made, with success. It was repudiated in the case of *Stanton v. Wilson*. Again, the agreement under consideration not only bears on its face the evidence of a consideration founded on the pecuniary advantage of membership, but also upon mutual promises expressed as clearly as words can speak. (See the opinion of the chancellor in *Stewart v. Hamilton College*, 2 *Denio*, 417.) The mutual promises of the several subscribers constitute the consideration, but the promise is to pay the subscriptions to a third party, viz. the corporation to be thereafter organized. That there is no tenable objection founded on the fact that the promise is to pay a third party, is established by the decision in the case of *Barker v. Bucklin*, (2 *Denio*, 45.) And that the promise is valid and binding, notwithstanding the party to whom the payment is to be made is a corporation not then in existence, but to be formed thereafter, we have proved by the cases of *Stanton v. Wilson*, and *The Farmington Academy v. Allen*, before cited.

A suggestion is made in the written argument furnished us, that the declaration is not properly framed to enable the plaintiff to recover upon the ground of a consideration founded on mutual promises. We can not say how that may be. The declaration is not set out in *hæc verba* in the case; but it is

The Hamilton and Deansville Plank Road Co. v. Rice.

stated that the fourth count was framed on the agreement, "*with all the necessary averments to charge the defendant.*" If then the averment respecting the consideration founded on mutual promises was necessary to charge the defendant, we must assume that the declaration contained it. There is, however, another conclusive answer to this suggestion. The objection was not made on the trial. If it had been then made, the amendment would, under the liberal provisions of the code, have been allowed on the spot; unless the defendant had proved by his oath that he had been misled by the variance.

II. The second general proposition on which the defendant objects to the plaintiff's right of recovery is embraced in his last three points, and is founded on the idea that inasmuch as the agreement signed by the defendant contemplated a company whose capital stock should amount to \$26,000, a subscription to the full amount of the sum named was a condition precedent to the right to recover. This is an error into which the counsel has fallen from not having carefully read the first sections of the plank road act. It is true that such a result will follow, where the subscription of a certain amount of stock is made a condition precedent by the terms of the act of incorporation. It was so held in the 6 *Pick. Rep.* 23; 10 *Id.* 142; and 9 *Id.* 187. It will be found, however, upon examination, that in each of these cases the condition was created by the act itself. The act under which this corporation was organized, provides that "when stock to the amount of at least \$500 for every mile of the road so intended to be built shall be in good faith subscribed, and five per cent paid thereon," &c. the said subscribers may elect directors, execute their articles and file them in the office of the secretary, from which time they are a legally organized corporation. This result is accomplished before the entire capital stock is subscribed, and generally before one fourth part is subscribed. The sum of \$500 is scarcely a fourth of the cost per mile of the cheapest plank roads constructed in this country. In the case before the court, it appears that the road is 15 miles in length, that it was somewhat more than two thirds done, and that the expenditure had already amounted to about \$20,000.

The Hamilton and Deansville Plank Road Co. v. Rice.

Again, by the very terms of the agreement which the defendant subscribed, he stipulated to become a member of a company to be organized, not when the whole capital stock should be subscribed, but "*as soon as the amount of stock required by the said act should be subscribed*," and to pay the amount of his subscription when the company should be organized. This objection, therefore, is without foundation.

III. We have already seen that a subscription to the articles of association can not be an act indispensable to membership of the company. For the articles are filed in the office of the secretary when, ordinarily, less than one third of the amount is subscribed. A subscription to any legal and valid instrument, by which a party engages to become a member of the company when organized, and to pay a given sum which is to be a part of the capital stock, followed up by an acceptance of a certificate for the stock, will make such subscriber a member of the corporation. The acceptance of the stock certificate is a waiver of any informality that may have intervened, short of an absolute defect of jurisdiction. In a case far less strong than this, the supreme court of Massachusetts held that the corporation might recover against a subscriber the amount of his subscription, under a general count for money paid at the defendant's request. In the 14th *Mass. Rep.* 172, before cited, the defendant, when called on for his subscription, said he had no money, but would deliver as part payment a quantity of shingles, which he accordingly did, and the same were received and used by the trustees. This was held by the court to have been such a recognition of his promise, and such an implied request to the trustees to proceed on the faith of that promise and expend money, relying upon its performance, that after they had actually expended the money, he was liable for the money so expended, to the amount of his subscription. If that case be law, then *a fortiori* will the acceptance of the certificate of stock by the defendant in this case lay the foundation for a recovery under a count for money paid.

IV. A map of the survey of the road is appended to the case to show how far the site of the road deviates from the route pre-

The Hamilton and Deansville Plank Road Co. v. Rice.

scribed in the articles of association. The route is thus described in the 12th article—"Thence on *or near* the highway laid out on the line of the Chenango canal through Bouckville, Solsville and Oriskany Falls," &c. The map shows a deviation from the highway thus designated, near Solsville, by which the plank road is carried round on the east side of a mill pond and a swampy piece of ground, instead of passing the west side, by which deviation it is apparent that the distance is somewhat shortened. Without such apparent reason for a departure from the exact route of the road laid out on the line of the canal, we would presume that the deviation was adopted for good cause, and we should regard it as within the true construction of the term "*near*" such route; as that term is always relative. The cases of *The People v. Collins*, (19 Wend. 58;) *Hallock v. Woolsey*, (23 Id. 328;) *The People v. Denslow*, (1 Caines, 177;) and *Griffin v. House*, (18 John. 397,) show that the deviation was allowable under a fair interpretation of the word "*near*," and was within the discretion of the company.

The money having become due, and the defendant liable to pay it, and the amount being a sum certain, the allowance of interest was right. Upon the whole case, we are satisfied, that the plaintiff should have judgment on the verdict. No rule of law has been violated, and so far as the testimony furnishes any basis for a just conclusion, the defendant had no justifiable ground for his defense of the action.

Judgment for the plaintiffs.

SAME TERM. *Before the same Justices.*

CRANDALL *vs.* CLARK.

As a general rule, in an action upon a contract, an averment of performance will not be sustained by evidence of a legal *excuse* for non-performance.

Where one person agrees to sell and deliver property, and another agrees to receive and pay therefor, in an action by the purchaser, for the non-delivery of the goods, an averment of a readiness and willingness to pay is indispensably necessary; and such averment must be proved, or the plaintiff can not recover.

Where a plaintiff, in order to show that a letter, given in evidence, was written by the defendant, proved by the postmaster at the place of the defendant's residence that on the day of the date of the letter in question there was a letter mailed at his office which was sent "eastward;" *Held* that such evidence was inadmissible for the purpose of raising a presumption that the letter thus mailed was the letter given in evidence, and that, being mailed on that day, it was probably the act of the defendant.

A direction to a jury that in determining whether a letter given in evidence is genuine, they may assume certain facts stated in it as true, and then infer, from the nature of those facts, that they could only have been known by the defendant, and therefore that the defendant must have been the author of the letter, is erroneous.

A jury can not rightfully assume, without proof, the truth of any statement in a letter which is challenged as a forgery, and when the issue before the jury is whether it is a forgery or not.

MOTION by the defendant for a new trial, upon a bill of exceptions. The action was assumpsit, upon a written contract. Plea the general issue. The cause was tried at the Madison circuit in December, 1848, when the jury found a verdict for the plaintiff, for \$113.

T. Jenkins, for the plaintiff.

H. Bennett, for the defendant.

By the Court, GRIDLEY, J. The plaintiff declared against the defendant in this cause, for the breach of a written contract executed by the parties on the 18th of August, 1845. By this contract the defendant agreed to sell his butter and cheese to

Crandall *v.* Clark.

the plaintiff, to be sent to Boston, on the condition that Clark should pay five dollars per hundred for the cheese, boxed and delivered in Utica, and twelve and a half cents for the butter; and when the produce should be sold, the profits were to be equally divided between the parties, after paying all charges, if the sales should be made above these prices. The plaintiff averred performance on his part, and a neglect and refusal on the part of the defendant to perform his part of the contract. It was proved on the trial that the place designated for the delivery of the butter and cheese in Utica, was the warehouse of Butler & Livingston. It appeared also that on the 2d of September the plaintiff, who resided near Boston, instructed the defendant, by letter, to send on the cheese and butter to Boston; and to draw on Parkes, Baldwin & Parkes, of Boston, at sight, signing his own name to the draft for the amount, directing it to be placed to the account of Truman Clark, and assuring him that the draft would be paid at sight. The defendant did not consent to this proposed change in the contract, but took the cheese to Butler & Livingston at Utica, and finding that the plaintiff had provided no funds to pay for the same, made a contract of sale with Messrs. Hubbard & Walker, and afterwards delivered it to them. The plaintiff gave no evidence of a performance on his part by showing that he was ready and willing to pay for the butter and cheese at Utica; but sought to show an excuse for his omission to perform his contract, by means of a letter bearing date on the 8th of September, 1845, and purporting to be signed by the defendant, stating that the time having elapsed, within which the plaintiff was to have written to the defendant, he had sold the cheese and butter to another person. The defendant objected to a recovery, upon the ground that the letter was not proved; and also that it was not competent for the plaintiff, under an allegation of performance, to prove an excuse for non-performance.

I. As to the question of pleading. It is not disputed that it was a condition precedent to a right in the plaintiff to recover, to show that he was ready and willing to receive the butter and cheese at the place agreed upon in Utica, and pay for the same;

Crandall *v.* Clark.

or to show some lawful excuse which would operate as a waiver of the condition and a dispensation of its performance. The rule was so laid down by Chief Justice Spencer in *Mockley v. Briggs*, (19 John. 71.) Again, in *Porter v. Rose*, (12 Id. 212,) it was decided that where "one agrees to sell and deliver, and the other agrees to receive and pay, an averment by the purchaser, in case he sues for the non-delivery, of a readiness and willingness to pay, is *indispensably necessary*; and that consequently the readiness and willingness to pay is matter *to be proved on his part*, whether the other party was at the place to deliver the thing contracted for, or not." (See also 2 *Wend.* 399, and cases there cited.) In this case the defendant proved that he was present and was ready and offered to deliver the property in question to Butler & Livingston on payment of the sum agreed on, but the plaintiff had furnished no funds. There can be no pretence that the defendant was bound to deliver the butter and cheese without payment being made; or that he was obliged to part with his property on the assurance of the plaintiff, in his letter of September 2d, 1845, that the defendant's draft on strangers, in Massachusetts, would be duly honored. It then appears that a material issue in the cause—a condition precedent to the plaintiff's right to recover—was not only not proved by the plaintiff, but disproved by the defendant. No one can doubt that thus far, both on the pleadings and the proofs, the defendant was entitled to a nonsuit, or a verdict. To avoid this result the plaintiff offered, and the justice who presided at the trial received, evidence of an *excuse* for non-performance, instead of the actual performance of the condition which he had alledged. This evidence consisted, in part, of the aforesaid letter, alledged to have been written and sent to the plaintiff on the 8th of September, 1845. The admission of this evidence was in our judgment erroneous. There was no appropriate issue in the pleadings for the admission of this evidence. To allow a party who had averred the actual performance of a condition precedent, to show an excuse for its non-performance, would be contrary to the first principles of pleading. The object of pleading is to inform the adverse party of the facts relied

Crandall *v.* Clark.

on by the pleader, to enable such adverse party to meet them by opposing proof. The better opinion therefore is, notwithstanding some cases that seem to look the other way, that, as a general rule, an averment of performance will not be sustained by evidence of a legal excuse for non-performance. Nor can this ruling now be upheld on the ground of the liberal provisions for amendments contained in sections 145 and 146 of the code of 1848. No amendment was asked for. And if it had been, a question would have arisen whether the defendant had not been misled; and he might have sworn that he was. The objection to this evidence, and its legal effect, was taken in due time, and we think should have prevailed.

II. We are also of the opinion that errors were committed both in the admission of evidence, and in the charge of the judge, upon the question of fact whether the letter of the 8th of September was actually written or sent by the defendant.

(1.) As to the admission of evidence. The testimony of handwriting, to charge the defendant, was very slight, even if it did not rest wholly on an opinion formed from the comparison of hands; while the evidence produced by the defendant, to show that the letter was not in his hand-writing, was exceedingly strong. With the view, therefore, of strengthening the case of the plaintiff on this point, the plaintiff was permitted to prove by the postmaster of Edmeston, Otsego county, that it appeared by the post office books that there was a letter mailed on the 8th of September which was sent "Eastward." Now if this was pertinent at all, it was to raise a presumption that the letter, which was mailed "Eastward," was the letter given in evidence; and that, being mailed on that day it was probably the act of the defendant. This was most dangerous testimony. It was quite likely to exercise an important influence on the minds of the jury; when it is easy to see that so far from identifying the two letters, the letter thus mailed may have been directed to any other place in New England than the residence of the plaintiff, and to any other person than the plaintiff himself, and may have been deposited in the office by any other individual than

Crandall v. Clark.

the defendant. Such evidence is too loose and mischievous in its character to be tolerated.

(2.) As to the charge of the justice, upon the question whether the letter was genuine, the justice charged in favor of its genuineness, among other things, in these words, "Who wrote the letter, if Crandall did not? Who but Crandall knew that Mr. Hoppack had offered more for his butter and cheese?" Now we can not but think that this part of the charge was calculated to mislead the jury. In truth there had been no evidence at all, in relation to any offer by Hoppack. *That* was a matter stated in the letter, and was assumed as true by the justice, and on that assumption he founded an argument in favor of the genuineness of the letter. The charge, therefore, was substantially a direction to the jury that in determining the question whether the letter was genuine, they might assume certain facts stated in it as true, and thus infer, from the nature of those facts, that they could only have been known by the defendant; and therefore that the defendant must have been the author of the letters. We think the learned justice erred in supposing that the jury could rightfully assume, without proof, the truth of any statement in a letter which was challenged as a forgery, and when the issue before the jury was, whether it was a forgery or not. (9 *Cowen*, 674.)

Other important questions were discussed by the counsel, but it becomes unnecessary to pass upon them.

A new trial is granted.

SAME TERM. *Before the same Justices.***ROSE vs. ROSE and others, executors, &c.**

*7 174
7th 524*
A devise of a farm by a testator, to his son, in satisfaction of a claim for services, such farm being sufficient in value for that purpose, and an acceptance thereof by the son, will, if the devise be unrevoked, constitute a perfect defense to an action by the son against the devisor's executors, for such services.

But such a devise will be revoked, by a conveyance of the same land to the donee, by the testator during his lifetime; and the claim of the son for his services will remain unsatisfied; unless it is agreed that the conveyance shall be in lieu of the devise, and in satisfaction of that claim.

What amounts to a valid delivery of a deed.

Whether evidence of other considerations than those enumerated, in a deed, is admissible? *Quare.*

MOTION, by the plaintiff, to set aside the report of a referee, by which it was found that there was nothing due from the defendants, as executors of Stephen Rose, deceased, to the plaintiff. The facts are sufficiently detailed in the opinion of the court.

H. Denio & T. E. Clarke, for the plaintiff.

C. P. Kirkland, for the defendants.

By the Court, GRIDLEY, J. This is a suit for labor and services, brought by a son against the representatives of his father. The ground of defense mainly relied on by the defendants' counsel is, that the demand has been satisfied by the devise of a farm, and an acceptance of it in satisfaction. The clause in the will upon which this question arises, is the following: "Firstly, my son, Marvin Rose, has labored for me a number of years since he became twenty-one years of age, and in consideration of such labor I set off and devise to him, the said Marvin Rose, his heirs and assigns, the following lot of land," &c. There can be no doubt but that the devise was intended to be in satisfaction of the claim of the plaintiff for ser-

Rose v. Rose.

vices, and as the farm is proved to be an ample fund for that purpose, if the devise has not been revoked, and has been accepted by the plaintiff, the defense is perfect. (2 *Hill*, 576, and the cases there cited. See also 2 *Story's Eq. Juris.* §§ 1103, 1119.)

But it is said that the testator revoked this devise by conveying the same land to the plaintiff in the month of October, 1846, a few weeks before his death. The referee has found that there was no consummated delivery of the deed. The evidence upon that point is found in the testimony of Thomas E. Clarke and of Elias Rose. Mr. Clarke was employed to go to the testator's residence for the purpose of drawing the deed and a bond and mortgage for twelve hundred dollars, which the plaintiff was to execute to the testator to secure that sum as a part of the consideration for the farm, the residue of the consideration, as expressed in the deed, being "natural love and affection." Mr. Clarke testifies that he drafted the deed; that it was signed by the testator, attested by the witness at the testator's request, acknowledged by him to be his act and deed, in answer to the formal question put by the witness, and delivered to the plaintiff. It is true that he did not see the deed pass by manual tradition, but he saw it in the hands of the plaintiff. He testifies further, that the plaintiff signed the mortgage, and requested the witness to sign it as a subscribing witness, which he did. It was then delivered to the testator, who, in pursuance of some family arrangement, assigned it to another son, who was to pay back \$200, and who borrowed a check for that amount of the witness. After this, the witness, at the request of the parties, took the deed and mortgage, for the purpose of proving them before a proper officer, but instead of doing so, delivered them to a justice of the peace with directions to call on the parties and take their acknowledgments. Elias Rose, another witness, testified that he was present at the execution of the deed, and that the testator actually delivered the deed to the plaintiff, who started to put it away, but instead of doing so, at the suggestion of the witness, he handed it over to Mr. Clarke who took the same, together with the bond and mortgage, to have them proved and recorded. Nothing transpired to indi-

Rose v. Rose.

cate that the delivery was not intended by the parties to be complete.

Upon this state of facts it is impossible to maintain that the deed was not delivered. It would have been a good delivery even if the deed had been retained in the possession of the grantor. Ch. Kent says, (4 *Kent's Com.* 455,) "If both parties be present and the usual formalities of execution take place, and the contract is to all appearance consummated, without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantors." In the case of *Souverbie v. Arden*, (1 *John. Ch.* 240,) the question as to what will amount to a delivery of a deed is most elaborately discussed, and on page 256 the learned chancellor declares that when all the formalities of a delivery take place, no mental reservation nor condition not disclosed at the time, will prevent the consequences of an absolute delivery. His language is very explicit. He says, "But if no such agreement or intention be made known at the time, and both parties are present, and the usual formalities of execution take place, and the contract is, to all appearance, consummated, and the deed is left in the power of the grantee or in the custody of his particular friend, without special instructions, there is no case to be found in law or equity in which such a delivery is not binding." The same doctrine was settled in the same way in the case of *Doe v. Knight*, (5 *B. & Cress.* 671,) and it was held that the delivery would be absolute when thus executed in presence of a witness, notwithstanding the possession of the deed is retained by the grantor. Upon authority, therefore, the deed under consideration was unconditionally delivered, and the title to the premises covered by the devise was vested absolutely in the plaintiff. It is true that there was evidence that neither the deed nor mortgage was ever proved or acknowledged; and that the plaintiff had declared that he had never accepted the deed. It is also true that the conduct of the testator evinced that he regarded the transaction as not completed. Probably both supposed that the execution of the deed was incomplete and liable to be defeated until it had been formally proved or ac-

Rose v. Rose.

knowledged. In that opinion they were mistaken. The delivery having been made, the title became irrevocably vested in the plaintiff; and no agreement of the parties, nor even the cancellation of the deed, could reinvest it in the testator. (6 *Hill*, 469. 23 *Pick.* 231. 4 *Wend.* 474, 5, 485.) (a)

If the deed was delivered, then the devise was revoked, and the claim of the plaintiff for his services remains unsatisfied, unless it was agreed that the conveyance of the premises should be in lieu of the devise, and in satisfaction of that claim. That fact was indeed proved by the testimony of Joseph Rose, but the evidence was objected to and was clearly inadmissible under the old authorities. It will be remembered that the only consideration mentioned in the deed was "twelve hundred dollars and natural love and affection," excluding by construction the idea that any part of the consideration consisted in the services of the plaintiff. It was very early held in *Maigley v. Hauer*, (7 *John.* 341,) that when the consideration is expressly stated in a deed and it is not said "*and for other considerations*," proof of any other consideration is inadmissible. (See also 4 *Cowen*, 431.)

But inasmuch as these authorities, so far as they are applicable to the point in question, have been much shaken, if not overruled, by the case of *McCrea v. Purmort*, (16 *Wend.* 460,) and by the authorities collected in Cowen and Hill's Notes, vol. 2, p. 1441 to 1444, and in vol. 1, p. 47, and as the fact itself was not passed upon by the referee, we will not anticipate a decision upon this branch of the case. But for the error of the referee to which we have already alluded, we grant a new trial.

Report set aside, and new trial granted.

(a) See also *Schutt v. Large*, (6 *Barb. S. C. Rep.* 373.) Nor will the alteration or defacing of a deed leave that effect. See cases collected in note to *Waring v. Smith*, (3 *Barb. Ch. Rep.* 124.)

SAME TERM. *Before the same Justices.*EVARTS & SCRANTON *vs.* PALMER.

Where T., the holder of a note made by G., assigned the same to E., and received as a consideration for the transfer, a note made by E. of the same date and amount and payable at the same time, without any understanding that his right to enforce the payment of E.'s note should depend on a recovery upon the note so assigned; *Held* that this amounted to an exchange of notes; that E. became the beneficial as well as the nominal owner of the note assigned to him by T.; and that in an action brought thereon by E., T. was not the "person for whose immediate benefit the suit was prosecuted," within the meaning of the 352d section of the code of 1848; so as to exclude him from being a witness.

If a person has no interest in the event of the suit, the fact that he had assigned to the plaintiff the note on which the suit is brought, even though such assignment was made for the purpose of making himself a witness, does not affect his competency.

MOTION for a new trial. The action was assumpsit, brought to recover the amount of a promissory note made by C. N. Griffin, on the 27th of October, 1840 for \$2,000, payable three months after date to the defendant Palmer or order, and indorsed by him. The cause was tried at the Oneida circuit in October, 1848, before Justice Shankland. On the trial the signatures of the maker and of the defendant as indorser were admitted by the defendant's counsel. It was also admitted that the note was duly protested for non-payment, and notice given to the defendant; and that the sum due upon the note was \$1937,72. The plaintiff then rested. The counsel for the defendant then called as a witness C. N. Griffin, and proved by him that the note was indorsed by the defendant for his accommodation. That he sold the note to Jesse Thompson, on the 4th of November, 1840, for \$1900, to be paid in the course of a few days. That Thompson, on that day, let him have \$460 towards it, on the 10th of November, \$540, and on the 12th of December, \$250; and that he failed in business shortly after, and never received any further sum upon the note, from Thompson. The defendant having rested, the plaintiff called Jesse Thompson as a witness, who, upon his preliminary examination by the

Evarts v. Palmer.

defendant's counsel, testified that he sold the note in question to William Evarts, one of the plaintiffs; that the recovery in this suit would result in his benefit; that he held the note of Evarts alone, for this note, and the money would belong to him, Evarts; that he got his note before this note was sued the first time; that there was no understanding that he was not to pay the witness unless he recovered on the note in question. The witness thought he should not collect the note of Evarts, unless the latter recovered upon this, as he was not now able to pay; that witness did not expect Evarts would pay his note if the note in question was not collected, because he was not able; that he should understand that when Everts got this money he would pay the witness, not otherwise; that this suit was substantially under the witness' control; that Evarts directed him to collect the note, as his agent; that he sold the note to Evarts because he supposed it would be necessary for him to be a witness in a suit upon it; that Evarts' note was payable at the same time the note in question is, and was dated in Jan. 1841. The defendant's counsel objected to the witness testifying in the cause, on the ground that the action was prosecuted for the immediate benefit of Thompson; and also because he assigned the note prosecuted, for the purpose of making himself a witness. The judge sustained the objection, and excluded the evidence, and the plaintiffs' counsel excepted. The plaintiffs' counsel then offered in evidence a release executed by the plaintiffs to the witness Thompson, also a release executed to the plaintiffs by Thompson; but the judge decided that the latter was still an incompetent witness, and excluded his testimony. Irene Thompson, the wife of Jesse Thompson, was then offered as a witness, and objected to, on the ground of interest, and her testimony was also excluded. The court charged the jury that the proofs showed the note was usurious, and that therefore they should find for the defendant. And they accordingly found a verdict for the defendant; who, upon a bill of exceptions, moved for a new trial.

Evarts v. Palmer.

J. Benedict, for the plaintiffs

F. Kernan, for the defendant.

By the Court, GRIDLEY, J. The questions arising on the bill of exceptions in this cause depend on the construction to be given to the 351st and 352d sections of the code of 1848. These sections are in the following words:

“§ 351. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

§ 352. The last section shall not apply to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action assigned for the purpose of making him a witness.”

After a preliminary examination of Jesse Thompson, a witness offered by the plaintiff, the defendant's counsel objected to his competency, on the ground that the action was prosecuted for his immediate benefit; and also on the ground that he had assigned the note on which the suit was brought, for the purpose of making himself a witness.

I. The first inquiry is whether the action was prosecuted for the *immediate benefit* of Thompson. If Thompson is to be believed, he assigned the note to Evarts, and received a note made by Evarts, of the same date and amount and payable at the same time, as a consideration of the transfer; and without any understanding that his right to enforce the payment of Evarts' note should depend on a recovery upon the note now in suit. In other words, it was a bona fide exchange of notes. And the consequence of that exchange was that Evarts became the absolute owner of the note which Thompson assigned to him. Evarts, therefore, and not Thompson, was the beneficial as well as the legal and nominal owner of the note. If this be so, it can not be maintained that the action was prosecuted for the “*immediate benefit*” of Thompson. To satisfy the words of the act, I think a person must be the party, beneficially interested, who owns the note, bond, or chose in action, which forms the foundation of the action. The assignee, who owns a bond on

Evarts v. Palmer.

which a suit is instituted in the name of the obligee as the nominal party, is an instance of a party for whose "immediate benefit" a suit is prosecuted. So too, the owner of the note in the case of *Mauran v. Lamb*, (7 *Cowen*, 174,) is another instance illustrative of the difference between a mere *witness* who is beneficially interested in the event of the suit, and a *party*, who is beneficially interested in the subject matter of the action. A person thus situated was, in the case cited, adjudged to be the real party in the suit, and, like the party on the record, not subject to be called as a witness by the adverse party. That this is the true interpretation of the phrase under consideration is apparent from the 350th section of the code, which subjects a person "for whose immediate benefit the action is prosecuted" to an examination as a party to the action, though he be not the party on record. We have seen that the party beneficially interested could not be compelled to testify against himself. The legislature, therefore, when they deemed it proper to subject the *party to the action* to an examination by his adversary, enacted the 350th section, with the view of placing the *party in interest* on the same footing. If we are right in this conclusion, then Thompson was not, within the meaning of the act, the "person for whose immediate benefit the suit was prosecuted," and he was therefore not incompetent under that provision of the act. I have said that, on the question of competency, the judge was bound to regard the exchange of notes as a valid and bona fide transaction, for the reason that Thompson testified that it was so, and that on this question he was the defendant's witness. But, we are bound to say, that there was much in the testimony of the witness, if it had come out on cross-examination, to lead a jury to suspect that the transfer was a mere cover, never intended by the parties to it to change the title to the note, or to affect the interest of Thompson in it. Upon such a conclusion, Thompson would be responsible to the defendant for his costs as the real party; and that interest could not be divested by any releases executed between Thompson and the plaintiff.

II. It remains to inquire whether the witness was incompe-

Decker *v.* Bryant.

tent on the ground that he had assigned the note in question for the purpose of becoming a witness. It is not claimed, that after the execution of the releases, he remained interested in the event of the suit, unless he could be regarded as the real party in the suit. If he had no interest in the event of the suit, then the assignment of the note on which the suit is brought, though made with the view of making himself a witness, does not affect his competency. The code does not declare such an assignor incompetent; but only that the 351st section shall not apply to him. That section merely provided that interest should no longer disqualify a witness. If that section is held not to apply to this case, then the witness, having no interest in the event of the suit, is competent upon general principles. The code was intended to enlarge, and not contract, the rule respecting the competency of witnesses. I have heretofore had occasion to examine this question in the *Hamilton and Deansville Plank Road Co. v. Rice*, (1 *Code Reporter*, 108,) (a) and see no reason to change the opinion there expressed. A new trial must be granted.

New trial granted.

(a.) See *Anns*, p. 157; *S. C. at the General Term*.

7b 182
3 Sep 25

SAME TERM. *Before the same Justices.*

DECKER *vs.* BRYANT.

A warrant, as against the person named therein, if fair upon its face, and showing jurisdiction in the person issuing it, will protect the officer acting under it.

But when it is sought to use the process as against third persons, as to attack the *bona fides* of a transfer of property, and it is insisted that the sale is fraudulent as against creditors, the preliminary proceedings necessary to establish jurisdiction must be shown.

Third persons are not estopped by the appointment of trustees under the 69d sec-

Decker *v.* Bryant.

tion of the act concerning attachments against absconding, concealed, and non-resident debtors, from contesting the jurisdiction of the officer, and the consequent validity of the warrant of attachment issued by him.

And no greater effect, as evidence, can be claimed for the report of the officer entertaining the proceedings, made to the supreme court in pursuance of the 68th section of that act, than is given to the record of the appointment of trustees.

It is not conclusive, on the question of jurisdiction over the case made by the attaching creditors, on their application for the attachment.

What facts are necessary to be alledged, in the affidavits, &c. upon an application for an attachment, under the act concerning absconding, concealed, and non-resident debtors.

A party, after having introduced evidence, before the jury, on the trial of a cause, can not be permitted to withdraw it, on finding that it does not answer his purpose. Evidence, once given, belongs to the cause, and is the common property of all the parties.

THIS was an action of trespass, brought by the plaintiff against the defendant, to recover damages for seizing and taking certain goods, wares and merchandise at the town of Chateau-gay in the county of Franklin, about the 6th day of September, 1847. The defendant pleaded the general issue, and gave notice in substance that he would prove on the trial that on the 6th day of September, 1847, a certain writ of attachment was duly issued by Joseph R. Flanders, Esq. county judge of said county, pursuant to the statute concerning attachments against absconding, concealed and non-resident debtors, in favor of John J. Van Nostrand and Henry D. Van Nostrand against Henry G. Decker, and directed to the sheriff of said county of Franklin, and that by virtue thereof the defendant, then and still being a deputy sheriff in and for said county of Franklin, afterwards, to wit, on, &c. at, &c. did seize and take the goods and chattels in the plaintiff's declaration mentioned, according to the command and for the purposes mentioned in said attachment, which are the same trespasses, &c.; and that the said goods and chattels then were the goods and chattels of said Henry G. Decker, or of the said Henry G. Decker and one Ira Blakely, and not the property of the plaintiff, and that the same were lawfully seized and taken by virtue of said attachment against the said Henry G. Decker.

Decker v. Bryant.

The cause was tried before Justice ALLEN, at the Jefferson circuit, in April, 1848. The plaintiff proved title to the goods, by virtue of a purchase thereof from Decker and Blakely, on the 1st of June, 1847, the value thereof, and the taking by the defendant under claim of an attachment against Decker and Blakely. The defendant's counsel, in opening the defense to the jury, stated the grounds of defense to be that the pretended sale and purchase of the said goods from the said firm of Decker & Blakely were void and made with intent to hinder, delay and defraud the creditors of that firm; that Henry G. Decker, one of the firm, had absconded from the state immediately after said sale, and that the said goods were seized and taken by the defendant as deputy sheriff, under and by virtue of the proceedings and the attachment mentioned and set forth in the notice. The counsel produced and offered a certified copy of a report of Joseph R. Flanders, Esq. county judge of Franklin county, under the seal of said county, and attested by the clerk thereof, of certain proceedings had before said county judge under the absconding or concealed debtor's act; to the introduction of which the plaintiffs' counsel objected; insisting that it was incompetent in this action, without first introducing in evidence the original affidavits and papers on which the attachment issued, and establishing thereby jurisdiction in Judge Flanders to issue such attachment; that although in the future proceedings under the attachment such report was made by the statute conclusive evidence of the facts therein contained, it did not dispense with the necessity of showing, by the original affidavits and papers, that the judge had sufficient before him to confer jurisdiction upon him to issue his warrant. The judge overruled this objection, and decided that this report was admissible in evidence, and held that the same was conclusive as to the facts recited which gave jurisdiction. The plaintiff's counsel excepted to this decision; whereupon the defendant's counsel stated that he would obviate this objection and would produce in evidence the original affidavits and papers upon which such attachment was issued; and he accordingly produced them. To the introduction of which the plaintiff's counsel objected, on the ground that

Decker *v.* Bryant.

the affidavits were insufficient to confer jurisdiction. The court held that the affidavits were clearly defective, and did not show sufficient to give jurisdiction, and rejected the papers on this ground. To this decision the defendant's counsel excepted. And thereupon the defendant's counsel offered to withdraw the affidavits and papers and to rely upon the report as sufficient. To this the plaintiff's counsel objected, and the judge remarked that inasmuch as the defendant's counsel had not been willing to risk his ruling in favor of said report, and to obviate the plaintiff's objection thereto had voluntarily produced and offered in evidence the affidavits and papers, which were clearly defective; thus himself showing that though Judge Flanders had no jurisdiction to issue said warrant, he had himself impeached the report and could not be allowed now to withdraw that evidence; to which opinion the defendant's counsel excepted. The counsel for the defendant contended that the report of the county judge was made by the statute conclusive, and that he had a right to withdraw the other papers and rely upon the said report, which was objected to by the plaintiff's counsel. The judge stated, that although he had at first received such report in evidence and held it competent, he still entertained serious doubts, as he did at first, as to the propriety of such ruling, but the defendant's counsel having waived such ruling in his favor, and sought by the introduction of the original affidavits and papers to establish jurisdiction, and having instead thereof himself impeached the jurisdiction of the officer making the report, he could not regard the report as sufficient evidence to entitle the defendant to justify under the attachment in this action; to which decision the defendant's counsel excepted. The counsel for the defendant then offered to prove that the plaintiff had purchased the goods in question from the firm of Decker & Blakely with intent to hinder, delay and defraud the creditors of that firm, and that John J. Van Ostrand and Henry D. Van Ostrand were at the time and still were, creditors of Decker & Blakely. To this evidence the plaintiff's counsel objected, on the ground that it constituted no defense, and was inadmissible unless the defendant had valid process against Decker & Blakely.

Decker *v.* Bryant.

ly; and that the defendant had himself shown that the county judge had no jurisdiction to issue such warrant or attachment, and the justice decided that the evidence would be of no avail, under the proofs as to the affidavits and papers on which the attachment was issued; and in that stage of the cause was not admissible, as it would be insufficient, unaccompanied by other proof of jurisdiction in the county judge. And the court intimated that under the proof as it then stood the principal question seemed to be in relation to the taking, and the value of the goods; and thereupon further evidence in relation to the value of the property was given by both parties. After the evidence was closed, the jury, under the charge of the court, rendered a verdict in favor of the plaintiff for \$569,77; and the defendant, upon a bill of exceptions, moved for a new trial.

G. C. Sherman, for the plaintiff.

B. Bagley, for the defendant.

By the Court, ALLEN, J. It was not made a point upon the trial that the warrant of attachment, being fair upon its face, protected the officer, and that the defendant was not bound to go back of it and show jurisdiction in the officer issuing it, and therefore the point was not properly taken upon the argument of the motion for a new trial, upon a bill of exceptions. But had this point been taken upon the trial, it could not have aided the defendant. As against the person named in the process the warrant, if fair upon its face, and showing jurisdiction in the officer, would have protected the defendant, an officer acting under it. But when it is sought to use the process as against third persons, as in this case, to attack the bona fides of a transfer of property, and it is insisted that the sale is fraudulent as against creditors, the preliminary proceedings necessary to establish jurisdiction must be shown. (*Van Etten v. Hurst*, 6 *Hill*, 311.) The question upon the bill of exceptions in this cause is whether the officer had jurisdiction to issue the warrant under which the defendant justifies the act complained of. It

Decker v. Bryant.

is provided by the 62d section of the act concerning attachments against absconding, concealed and non-resident debtors, (2 R. S. 12,) that the appointment of trustees, the record thereof, and the transcript of such record, duly certified, shall in all cases except on the hearing of a petition, as provided in the act, be conclusive evidence that the debtor therein named was a concealed absconding or non-resident debtor within the meaning of the act, and that the appointment and all the proceedings previous thereto were regular. In *Hubbell v. Ames*, (15 Wend. 372,) it was held that the production of the appointment of trustees was sufficient to show that the officer had jurisdiction. But it was not decided in that case that the debtor, or any other person, was concluded by such appointment from alledging that the preliminary proceedings were fatally defective. In the *Matter of Hurd*, (9 Wend. 465,) and in the *Matter of Faulkner*, (4 Hill, 600,) it was decided that the only effect of the estoppel created by the act was to prohibit the debtor from disproving the facts alledged in the petition, and that the question whether the officer had jurisdiction was, notwithstanding the appointment of trustees, an open question to the debtor. Nelson, J. in *Hurd's case*, says, "its effect is to preclude all inquiry into the regularity of the proceedings, and to estop the party from denying that he was an absent debtor; but it does not debar him from contesting the jurisdiction of the officer, or insisting that his case is not within the statute." Bronson, J. in *Faulkner's case* says, "It [the estoppel created by the 62d section] does not touch the question whether the proceeding was not utterly groundless at the first, taking the case as it appeared in the ex parte application of the creditor. That question, for aught that I can see, must always remain open to the debtor; for if the officer had no jurisdiction, the whole proceeding is *coram non judice*." If the debtor is not estopped by the appointment of trustees from contesting the jurisdiction of the officer and the consequent validity of the warrant, most certainly third persons who have no other means of testing the validity of the proceedings should not be estopped by such act. The defendant did not give in evidence the appointment of trustees, and the record

4

Decker *v.* Bryant.

thereof, but introduced the report of the officer made to the supreme court in pursuance of the 68th section of the act, (2 R. S. 13,) which requires such report to be made within twenty days after the appointment of trustees, and declares that "such report and a certified copy thereof, under the seal of the court, and attested by the clerk, shall be conclusive evidence that the proceedings stated therein were had before such officers." No greater effect, as evidence, can be claimed for this report than could be claimed for the record of the appointment of trustees. At most it is only another mode of proving such appointment. It is therefore not conclusive, on the question of jurisdiction upon the case made by the creditors on their application for the attachment. Whether it proves the appointment of trustees, so as to dispense with other evidence of the preliminary proceedings, it is not necessary to determine. In *Hubbell v. Ames* the defendants gave in evidence the appointment of trustees, as well as the report of the officer showing the fact. But the report itself, I think, fails to show jurisdiction in the officer. It certainly is not evidence of any thing more than is stated in it; and we can not intend that the proof established facts not alledged as a ground for the proceeding. The application was for a warrant against Henry G. Decker, upon a joint debt against him and one Blakely. The statute (2 R. S. 3, § 1) authorizes the attachment of the property of a debtor "whenever such debtor, being an inhabitant of this state, shall *secretly* depart therefrom with intent to defraud his creditors." The report says that the application was upon the ground that the said "Decker & Blakely being inhabitants of this state, Henry G. Decker, one of the said debtors, had then *recently* departed therefrom, with all the availss of the said Decker & Blakely, and that Ira Blakely, the other of the said debtors, was about to depart therefrom, with intent to defraud their creditors." 1. It is not alledged and therefore was not proved, that Decker had "*secretly*" departed from this state, and the "*secrecy*" of the "*departure*" is a fact necessary to be established to bring the debtor within the purview of the act. 2. There is no intent to defraud creditors alledged against Decker. It is merely alledged that he had

Decker *v.* Bryant.

"recently departed" with "all the *avails* of Decker & Blakely." Probably it was intended to alledge that he had taken with him all the property of that firm; but it is not so stated. 3. The intent to defraud creditors is charged by the application upon Blakely, who was about to depart from the state; and that did not authorize the attachment against Decker.

The plaintiff, however, not willing to rest his case upon the evidence of jurisdiction presented by the report, introduced the original application and affidavits upon which the officer acted. And having once put them in evidence he could not withdraw them upon finding they would not answer his purposes. As well might he, after proving a fact by parol, as for instance the declaration of his adversary, which, instead of aiding his defense tended directly and very strongly to overthrow it, be allowed to withdraw the evidence. For the purposes of the trial the party had made his election upon what evidence he would rely; and it would be singular indeed if, at the close of the trial of a cause, a party could select from the evidence introduced by himself such parts as he deemed favorable, and exclude the residue from the consideration of the jury. Before the evidence is given it is within the control of the party. Once given, it belongs to the cause and is the common property of all the parties. But if the defendant could have withdrawn the evidence and been permitted to fall back on the report of the judge, still the affidavits and papers were within the reach of the plaintiff, and were, as we have seen, competent evidence for him; and if in evidence, whether given in evidence by the one party or the other is immaterial. The question is whether they show jurisdiction in the officer. I think they do not. The "facts and circumstances to establish the grounds on which application is made" must be verified by the affidavits of two disinterested witnesses. (2 R. S. 3, § 5.) The grounds upon which application was made were the same as stated in the report of the judge; and these grounds, if well established, were not within the act. The party is confined, in his proof, to the ground alledged in his application. But if permitted to establish his right to an attachment by affidavits for causes not alledged in his application, the affidavits in

Decker *v.* Bryant.

this case were, within well established principles, entirely insufficient. They furnished no legal evidence whatever of the existence of the facts upon which the attachment could issue. Willard, one of the witnesses, states that Decker had secretly departed from the state "with intent to defraud the creditors of Decker & Blakely," and then states that he is informed by Blakely that Decker took away with him all the property of Decker & Blakely, the avails of goods bought of the attaching creditor and for which their debt was contracted, and that he (Blakely) had nothing wherewith to satisfy the said demand.

1. The witness does not state that he believes the information derived from Blakely to be true, and does not alledge that as a fact or circumstance upon which he founds his allegation of the secret departure of Decker with intent to defraud creditors.

2. There is no reason stated why the affidavit of Blakely was not procured. His statement was strictly hearsay, and may have been made for the purpose of enabling the creditors to procure the attachment against Decker. And this is highly probable, from the fact that the plaintiff's agent did not venture to swear to his belief of its truth. It was in no sense legal evidence upon which the officer had a right to act. (*Matter of Bliss*, 7 *Hill*, 187.) Even if competent with other facts, it was entirely incompetent alone. (*Miller v. Brinkerhoff*, 4 *Denio*, 118.)

3. The affidavit that the debtor had absconded with intent to defraud his creditors, was insufficient. The intent was matter of opinion—a conclusion from facts which should have been stated by the witness, in order that the officer could judge as to their sufficiency. (*Smith v. Luce*, 14 *Wend.* 237. *Ex parte Robinson*, 21 *Id.* 672.) In *Miller v. Brinkerhoff* the affidavit was stronger than in this case, but was held insufficient to protect the officer, in an action of trespass brought by the debtor for property taken under an attachment issued by a justice of the peace. If the other affidavit was sufficient in form it would not aid the defendant, as the statute requires the "facts and circumstances" to be established by two witnesses. But the affidavit of Parker is also defective. 1. The first circumstance stated, viz. that the debtors had not the spring previous sent any

Croswell v. Crane.

remittance to their creditors, is stated upon belief only. (*Kingsland v. Cowman*, 5 *Hill*, 608.) 2. It states that Decker had "absconded," without stating that he had left the state, or with what intent he had left. He should have stated the circumstances under which he left, so that the officer could judge whether he had secretly departed from the state with intent to defraud his creditors. 3. He should have stated what he saw, and the manner in which they conducted their business, from which he inferred an intent to defraud creditors. 4. The assignment of Decker & Blakely is stated upon information and belief. (*Ex parte Haynes*, 18 *Wend.* 615.) And the mere fact that they had sold their property, or made an assignment, is not legitimate evidence, alone, of an intent to defraud creditors. (*Connell v. Lascells*, 20 *Wend.* 77, and cases cited above.) Neither affidavit was sufficient, and the attachment was unauthorized.

A new trial is denied.

SAME TERM. *Before the same Justices.*

7b 191
151a 281

CROSWELL and VAN BUREN vs. CRANE.

A lease of lands by parol for a term of one year, to commence *in futuro*, is within the prohibition of the revised statutes respecting fraudulent conveyances and contracts relative to lands, (2 *R. S.* 134, § 6,) and is therefore void.

Such a lease is also void, under the statute of frauds, as being a contract which, by its terms, is not to be performed within one year from the making thereof. The second section of the title of the revised statutes relative to fraudulent conveyances and contracts respecting goods and chattels (2 *R. S.* 135) includes also agreements in respect to real estate, which, but for it, would have been valid.

In the revision of statutes, an alteration in the phraseology, or the omission or addition of words, does not necessarily alter the construction of the act, or imply an intention on the part of the legislature to alter the law.

In the revision of the laws, a reform of the language is not necessarily an alteration of the law.

Croswell v. Crane.

The intent of the legislature to alter the law must be evident, or the language of the new act must be such as palpably to require a different construction, before the courts will hold the law changed upon such revision, merely from the fact of a change of the language employed.

A lease, although for a term commencing *in futura*, passes a present interest in the term, to the lessee.

The making, signing and tendering a lease to a tenant, by the lessor, is not a leasing or writing, within the statute of frauds, if the lease does not follow the parol contract between the parties, and the lessee refuses to accept the same.

A landlord can only recover, in an action for use and occupation, for the time the tenant has *actually occupied* the premises, either by himself or by his sub-tenant or agent.

When the tenant has not entered into possession at all, *under the lease or agreement*, either in person or by an under tenant or agent, no recovery can be had.

An action for use and occupation is founded on contract, express or implied, and lies only when the relation of landlord and tenant exists.

If the circumstances of the case are inconsistent with the existence of a contract, and necessarily rebut every implication of a promise to pay rent, that form of action will not lie.

THIS action was brought to recover the rent of certain premises in the city of Oswego; the plaintiffs counting specially upon a demise alledged to have been made in January, 1845, for a term of one year, to commence the first of May thereafter, at the yearly rent of \$450, payable quarterly, and also for the use and occupation of the same premises. The cause was tried before a referee. On the trial the plaintiffs proved that the defendant had occupied the premises, as their tenant, for the year ending May 1, 1845, and had underlet a portion of the premises to Carrington & Pardee. The plaintiffs also proved that their agent, in January, 1845, offered the premises to the defendant for another year, at the rent of \$450; that the defendant said it was high rent, but that he had made no other arrangement, and must have the premises at any rate; that he would take the premises, or must have them. The defendant said, at the same time, that he must be permitted to make some repairs; to which the agent replied, "of course, some repairs will be necessary." The defendant said he wanted a memorandum in writing, and the agent promised to prepare it and have it executed. And in February the agent prepared a lease corresponding with that counted upon, and executed the same in behalf of the plain-

Croswell v. Crane.

tiffs, and handed it to the defendant, with a corresponding agreement to be executed by the defendant as tenant. The defendant did not retain the papers, but returned them to the agent, saying he would do what he said; that it was a bargain, and he would stick to it, but that he was going to Albany and would see Croswell and get him to take off part of the rent, which was too high. There was evidence that the premises were greatly out of repair, and required a considerable expenditure to put them in proper condition for occupation. Before the first of May the defendant gave notice that he should not occupy the premises after that time, and upon the expiration of his term, on the 30th of April, he returned the keys to the plaintiffs' agent. It was doubtful, upon the evidence, whether Carrington & Pardee continued to occupy a portion of the premises after the first of May, 1845, and before October of that year. In October there was an arrangement between the parties, by which the plaintiffs were permitted to rent the premises without prejudice to their claim against the defendant, except as to the amount they might actually receive for their use and occupation; and under that arrangement the premises were let by the plaintiffs, who, in an account rendered of their receipts and expenditures, credited \$75 as received of "Carrington & Pardee, rent of south basement for the year." The referee reported in favor of the defendant, and the plaintiffs moved for a new trial, upon a case.

L. Babcock, for the plaintiffs.

D. H. Marsh, for the defendant.

By the Court, ALLEN, J. It is at least doubtful, upon the evidence, whether there was a concluded agreement between the parties for the renting of the premises from the first of May, 1845; and had the referee reported against the plaintiffs, upon the ground that no such agreement was proved, I do not think the report could have been disturbed. The evidence of the plaintiffs' agent shows that at the time when it is claimed that

Croswell v. Crane.

a final agreement was made, there were matters left, thereafter to be settled by agreement, viz. the character and amount of the repairs to be made upon the demised premises, and at what time to be done, and in what manner allowance should be made to the defendant therefor. This matter required further negotiation, and such negotiation was contemplated by the parties ; and so long as the agreement rested in treaty, while negotiation was still open, and the terms unsettled, it was optional with either party to withdraw from it. Again ; the parties provided for a written lease, and the terms of that lease were to be settled and agreed upon, and when executed it was to constitute the agreement. But the referee based his report upon the legal questions made by the parties, and in his decisions followed substantially the opinion of this court given upon a former motion in this cause ; although the questions are presented in a different form.

It is insisted in behalf of the plaintiffs, 1st. That the lease of the premises by parol, being but for the term of one year, although to commence *in futuro*, is not within the prohibition of section six of title one of chapter seven of part two of the revised statutes. (2 R. S. 134.) Before the revised statutes, leases for terms not exceeding "three years *from the making thereof*," reserving rents of a certain value, were authorized to be made without writing. (2 R. L. 78, § 9.) This act was a transcript, substantially, of the act of 29 Car. 2, ch. 2, under which it was settled that leases by parol, to commence *in futuro*, for terms which would expire within three years from the making thereof, were valid ; but that like leases for three years or less, which would not terminate within three years from the making of the agreement, were invalid. (12 Mod. Rep. 610. 1 Stra. 651. 2 Ld. Ray. 736. Bac. Abr. tit. *Agreement C.*)

The legislature, in the revision of the laws, have in some respects, changed the terms of the act as well as altered the phraseology ; and the alteration of the phraseology gives rise to the question now presented. The former act authorized leases by parol for terms not exceeding three years. The present act authorizes them only for one year. The former act made the rea-

Croswell v. Crane.

dividion of certain rents upon parol leases necessary to their validity. The act in force at this time dispenses with that requirement; leaving it to the parties to regulate the amount of rent. The change in the phraseology alluded to, consists in the omission of the words, "from the making thereof," contained in the former act, after the designation of the terms for which parol leases may lawfully be made. The language of the revised statutes, so far as it is necessary to quote it, is as follows: "No estate or interest in lands, *other than leases for a term not exceeding one year*, nor any trust, &c. shall be created, &c. unless by act, &c." That of the revised laws, was to the effect that all leases, &c. not in writing, should have the force and effect of leases at will only, "except nevertheless, all leases not exceeding the *term of three years from the making thereof*, whereupon the rent reserved," &c.

It is well settled that in the revision of statutes an alteration in the phraseology, or the omission or addition of words, does not necessarily alter the construction of the act, or imply an intention on the part of the legislature to alter the law. In a revision of the laws a reform of the language is not necessarily an alteration of the law.

The intent of the legislature to alter the law must be evident, or the language of the new act must be such as palpably to require a different construction, before the courts will hold the law changed, upon such revision, merely from the fact of a change of the language employed. (*Gaffney v. Colvill*, 6 *Hill*, 574. *Theriat v. Hart*, 2 *Id.* 280. *In the matter of Brown*, 21 *Wend.* 316, 319, *per. Kent, Ch. J.* *In the matter of Yates*, 4 *John.* 359. *Taylor v. Delancy*, 2 *Caines' Cas. in Err.* 143, 151.) In the cases last cited, Spencer, J. whose opinion was adopted by the court for the correction of errors, says, "These acts are of the description of revised laws, and if susceptible of doubt in their interpretation resort must be had to the law existing antecedently." And again, "My opinion is founded on this proposition, that when the law antecedently to the revision was settled either by *clear expressions in the statutes*, or adjudications on them, the mere change of phraseology shall not be deemed or con-

Croswell *v.* Crane.

strued a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change." In that case, the question was whether the surrogate had a discretionary power, in the granting of administration, to elect between kin of equal degree. The statute of 21 Hen. 8, ch. 5, of which the act of 14th February, 1787, was held to be a revision, granted such discretion to the ordinary, in express terms, which terms were omitted in the act of 1787. And Spencer, J. says, "The revisers of the laws in 1787 well knew, that this statute (21 Hen. 8) vested a discretion, and still we find no term made use of negating that discretion or purporting to change the law." And the court held that the law was not altered by this omission, but that the discretion before vested in the ordinary was then vested in the surrogate. Again; the act of 1813 (1 R. L. 437, § 12) restricted the claim of a landlord upon goods seized upon execution, to the rent due "*at the time of the taking*" of the goods on the execution. The revised statutes (1 R. S. 746 § 12) do not contain the restriction contained in the clause quoted; but the court held that the omission of these words did not work a change in the law. (*Theriat v. Hart, supra.*)

There is nothing in the phraseology of the revised statutes to authorize the inference that the legislature intended to change the law which existed antecedently, in respect to the time from which the term for which parol leases might be granted, should be computed. Indeed, were the question a new one, arising upon the statute as it now reads, without the aid of any previous legislative enactments, or judicial constructions, the most reasonable construction which could be given to the provision, would be to limit the exception to leases for terms not exceeding one year from the making thereof. 1. The lease, although for a term commencing in *futuro*, passes a present interest in the term, to the lessee. (1 *Hill*, 484.) And it would be reasonable, therefore, to infer that the legislature, in fixing the term for which a lease by parol should be valid, in the absence of any provision to the contrary, intended that the time of the commencement of the interest of the lessee in the term should be the time from which the continuance of that interest should

Croswell v. Crane.

be computed and limited. 2. Upon any other construction, a lease by parol for a year and a day, commencing from the time it is made, would be void by the statute, while successive leases, for a year each, might be given by parol, to the same or different lessees, each term to commence on the expiration of a precedent term, for any number of years; an inconsistency in legislative action not to be presumed, except upon the plainest expression in the statute. There is certainly nothing in the revised statutes which limits the time at which a lease for a year shall commence, if it may commence at any time after the making thereof, or to prohibit the giving of two or more leases for a year each, and the respective terms to commence at such times *in futuro* as not to interfere with each other. 3. The construction of the present act, in conformity with the former legislative provisions, and the adjudications under them, will best promote the design and intent of the statute for the prevention of frauds and perjuries, and make the action of the legislature consistent with the history of past legislation upon the same subject. The legislature, as well as the revisers, knew the period fixed by the antecedent law, and if they had intended to fix a different period for the commencement of the term for which a parol lease might be given, they would have said so expressly, and would not have left it in doubt and uncertainty, both as to their intent to make any change in this respect, and also in regard to the time at which the term should commence.

By reference to the notes of the revisers, and the acts of the legislature upon the section under consideration, there can be but little doubt as to the intent of each upon this subject. The section was adopted by the legislature as reported by the revisers, except that the legislature substituted the words "leases for a term not exceeding one year," in lieu of "leases not exceeding three years," as reported. The revisers in their original note, (3 R. S. 655, 2d ed.) state that the only alteration they proposed was in the omission of the clause limiting the rent of such leases; and they evidently contemplated no other alteration of the provisions of the then existing law. They retained the term of three

Croswell v. Crane.

years provided by the former acts, and which was only altered by the legislature by the substitution of "one year" for "three years." Had it been intended to suffer such leases to be made for the full term mentioned in the act, and to commence *in futuro*, instead of "at the time of the making thereof," some notice would have been taken of the change. Or had the revisers reported the section in the phraseology of the former act, and the legislature had, when they changed the period for which such leases might be given, from three years to one year, struck out the words "from the making thereof," there would have been reason to suppose that an alteration of the law, in that respect, was intended. The revisers say in their notes to this chapter, "In preparing these provisions, one great object has been to restore (in conformity to the general course of our own courts) the salutary principles of the original statutes, with such modifications and improvements as have been suggested by experience, or as seem to be demanded by our state of society." (3 R. S. 654, 2d ed.)

If we are right in the view which we have taken of the statute, then the lease in question was for a longer period than one year from the making thereof, and therefore void, and the action can not be maintained upon the special counts.

We are aware that in the second edition of Cowen's treatise (1st Cowen's Tr. 2d ed. 270) it is said in reference to this section of the statute, "this change in the phraseology of the statute would certainly seem to indicate an intention in the legislature to authorize the making of parol leases, 'for a term not exceeding one year,' to commence *in futuro*." But it is also said that the effect of this alteration, in the language of the statute, remains open to judicial construction. While we respect, and would defer to the opinion of the learned jurist who is supposed to speak in the work quoted, when fully expressed, we can not yield to the opinion thus intimated. It is highly probable that the statute, and the history of the change in its language, were not examined with the care and attention which they would have received in a judicial investigation by the same eminent judge. We were also cited by the plaintiffs' counsel to the

Croswell v. Crane.

opinion of Ch. J. Bronson, in *Wilson v. Martin*, (1 *Denio*, 605,) in which he says "But there is no leasing of lands, or any interest in lands, in the case"; from which expression we are asked to infer that the court would have held the agreement in that case valid, as a lease by parol for one year, to commence *in futuro*. This is not a necessary inference. Had the agreement in that case been a leasing of real estate, and the defendant had entered into possession under the lease, as he had occupied the lodgings, then, although the agreement would have been void as a lease, yet the defendant would have become a tenant of the plaintiffs from year to year. The agreement would have regulated the amount of the rent, and the period at which the tenancy expired, and the rights of the parties would have been entirely different than under a contract for board and lodging. (*Schuyler v. Leggett*, 2 *Cowen's Rep.* 660. *Rowan v. Lytle*, 11 *Wend.* 614. *Jackson v. Salmon*, 4 *Id.* 327.)

2dly. The referee held that the lease was void, for the reason that it was a contract that, by its terms, was not to be performed within one year from the making thereof. (2 *R. S.* 135, § 2.) If our conclusion upon the other question is correct, it is not necessary to decide this point; and the referee having held the lease void upon the other ground, was not called upon to pass upon this question. But I am inclined to think that the contract is within the prohibition of the act last quoted. Where the statute authorized the leasing of lands by parol for a term not exceeding three years from the time of making the lease, this provision did not apply to contracts of that character; upon the principle that in construing a statute, effect is to be given to every part of it, if possible. And hence leases of that character, although within the words of the act making void contracts by parol which were not to be performed within one year, were virtually excepted from its operation. But that reason no longer operates; and the reason ceasing, the rule itself must cease. The words in the statute being express, plain and clear, they are to be understood according to their genuine and natural signification and import. (*Bac. Abr. Statute H. 2*; *Rockfort v. Fitzmaurice*, 2 *D. & W.* 19; *Jones v. Jones*, 6 *Shep.* 308; *Smith v.*

Croswell v. Crane.

Bell, 10 *Mees. & Wel.* 378; *The Sussex Peerage*, 11 *Cl. & Fin.* 86; 4 *East*, 438.) The words of the act are very general, and include "every agreement that by its terms is not to be performed within one year from the *making thereof*." This clause, taken in connection with the 6th section of the first title of the same chapter, adds force to the construction which we have given to that section. For it is reasonable to presume that the legislature intended to make the provisions of the statute uniform, and compute the year within which parol agreements were to be performed from the time of the making the agreement; whether the agreements had reference to the occupation of real estate, or any other matter which might be the subject of an agreement. We think the section now referred to includes agreements in respect to real estate which, but for it, would have been valid, as well as agreements in relation to goods, chattels and things in action. (*Pitkin v. Long Island R. R. Co.*, 2 *Barb. Ch. Rep.* 232, *per Chancellor*. *Broadwell v. Getman*, 2 *Denio*, 87.) This contract was not, by its terms, to be performed within the year, and was therefore void. (*Broadwell v. Getman*. *Wilson v. Martin*, *ubi supra*. *Lockwood v. Barnes*, 3 *Hill*, 128.)

3dly. It is insisted that the making, signing and tendering a lease to the defendant, by the agent of the plaintiffs, was a leasing or writing within the statute of frauds, and that the plaintiffs were entitled to recover, upon the evidence of such leasing. To this there are several answers. 1st. The lease did not follow the contract by parol. (1.) It provided for payment of rent quarterly, which was unauthorized. (2.) It did not provide for any repairs; a matter which was expressly provided for in the parol agreement, if any such agreement was ever concluded, and which was essentially necessary to make the premises tenable. But 2dly. The defendant never accepted the lease. The plaintiffs' agent did not even tender it in execution of the parol agreement, but merely offered it, and withdrew it, and retained it upon the suggestion of the defendant that he would see Croswell. But if he had formally tendered it and left it with the defendant, that would not have rendered valid a prior

Croswell v. Crane.

void agreement, unless the defendant had accepted it as a lease. If the agreement was void the plaintiffs could not validate it by signing the writing required by the statute. It was optional with both parties whether they would make a valid agreement, and the defendant could only become bound by accepting a valid lease, which he never did. To make a valid leasing there should have been a unity of the minds of the parties at the time the written lease was offered. (*Chit. on Cont. 7th Am. from 3d Lond. ed. pages 9, 10, and cases cited in notes.*)

The next question that arises in the case is whether the plaintiffs can maintain an action for use and occupation. It is not pretended that the defendant in person occupied any part of the premises; but it is contended that he had rented a part of the premises for the previous year to Carrington & Pardee, who had not yielded possession of the part occupied by them, but had continued to occupy that part through the year 1845; and that the defendant can not be held to have surrendered the possession of any part of the premises until the whole were vacated; and that Carrington & Pardee having entered as the tenants of the defendant, he was bound to compel them to vacate the premises. The defendant insists that the evidence does not show that Carrington & Pardee remained in possession after the first of May, 1845, except by consent of the plaintiffs under the stipulation of October 18th.

The evidence is not very clear as to the occupation by Carrington & Pardee after May 1, 1845. There is no evidence, however, that after the 1st of May, 1845 they occupied by the assent of the defendant, or that they were in any respect his tenants after that time. It is provided by statute, (1 R. S. 748, § 26,) that "any landlord may recover, in an action on the case, a reasonable satisfaction for the use and occupation of any lands or tenements by any person under any agreement not made by deed." This statute has received a construction in the cases of *Wood v. Wilcox*, (1 Denio, 37,) and *Beach v. Gray*, (2 Id. 84.) And under the act the landlord can only recover, in an action for use and occupation, for the time the tenant has *actually occupied* the premises either by himself or his sub-ten-

Croswell *v.* Crane.

ant or agent. And where the tenant has not entered into possession at all, *under the lease or agreement*, either in person or by an under tenant or agent, no recovery can be had.

In this case, if it be conceded that Carrington & Pardee continued in the possession of a part of the premises in question, as the under tenants of the defendant, then the recovery should be graduated by the extent and time of such occupation. The premises were calculated and intended for subdivision and several occupancy by different tenants. As actual occupation by the defendant or his under tenant or agent is the necessary foundation of this action, the plaintiffs in this case could in any event only have recovered for that portion of the premises actually occupied by Carrington & Pardee, and for the time they so occupied. And it appears by Schedule D. that the plaintiffs received of Carrington & Pardee the value of their occupation for the whole year. But there is no evidence in the case that Carrington & Pardee were the under tenants of the defendant, or continued in the possession of the premises after the 1st of May, 1845 by his assent or permission; and this fact must have been found in favor of the plaintiffs before they would have been entitled to recover for use and occupation. (*Tancred v. Christy*, 12 *Mees. & Welsby*, 316.) It is true that the defendant was bound, on the expiration of his prior term, on the 1st of May, to surrender the possession of the premises to the plaintiffs. But that liability grew out of his contract for the rent of the premises for the previous year; and for a breach of that contract the plaintiffs had their remedy by action upon it. It by no means follows that from a violation of that contract the referee could infer that the defendant had made an entirely different contract, against his express protest that he had not made and would not make such different contract. In *Waring v. King*, (8 *Mees. & Wels.* 571,) the defendants had rented the premises for nine months, with the privilege, at the end of that time, of taking a lease for 7, 14, or 21 years, and before the expiration of the nine months sub-let the premises for six months, which did not expire until after the expiration of the nine months, and the sub-tenants

Croswell v. Crane.

occupied the premises until the expiration of their term. The court held that the defendant having actually let the premises for a term which did not expire within the nine months, was evidence from which a jury might infer an election to take a further lease of the premises in pursuance of the agreement, and an occupation in pursuance of such election. In other words, that the relation of landlord and tenant between the parties continued to exist by the election of the defendant. No stress is laid upon the occupation, aside from the assent of the defendant. An action for use and occupation is founded on contract express or implied, and lies only when the relation of landlord and tenant exists. (*Bac. Abr. Rent*, K. 7. *Henwood v. Cheeseman*, 3 *Serg. & Rawle*, 500. *Osgood v. Dewey*, 13 *John.* 240. *Codman v. Jenkins*, 14 *Mass.* 93.) If the circumstances of the case are inconsistent with the existence of a contract, and necessarily, upon any fair construction, rebut every implication of a promise to pay rent, this form of action will not lie. (*Burton v. Binney*, 11 *Pick.* 1. *Tew v. Jones*, 13 *Mees. & Welsb.* 12. *Featherstonhaugh* ads. *Bradshaw*, 1 *Wend.* 134.) The facts proved in this case are entirely inconsistent with the idea that the relation of landlord and tenant existed between the parties after the first of May, 1845. The defendant had long before then given notice that he should not occupy the premises as the tenant of the plaintiffs, and repudiated the agreement which it is claimed he had made for their occupation another year. And at the expiration of the then current year he surrendered the keys of the part then occupied by him, and renewed the notice; and as before remarked, there is no evidence that from that time he assented to the occupation of any part of the premises by Carrington & Pardee, or that they occupied otherwise than as trespassers as well against the defendant as the plaintiffs. The defendant, so far as the evidence goes, did not have, or exercise, or claim to have or exercise, any control over the premises; nor did his acts or omissions influence or affect the occupation of any part of the premises after the surrender of the keys by him.

We can not, in view of these circumstances in direct contra-

White *v.* Low.

diction of his express declaration that he would not occupy the premises or pay for their occupation, imply that he did occupy them and promise to pay a reasonable compensation therefor.

The motion to set aside the report of the referee is denied.

ALBANY SPECIAL TERM, October, 1849. *Hand, Justice.*

WHITE, receiver, &c. *vs.* Low and ARTCHER, impleaded with Seaton.

When a plaintiff sues as receiver, he should at least state the place of his appointment, and distinctly aver that he has been appointed by an order of the court. The defendant has a right to insist that the facts constituting the appointment of the plaintiff, as set out, shall be sufficient to show one has been made, and that those facts be so set out as to be triable.

But a demurrer, in a suit by a receiver, alledging that it does not appear that the plaintiff had any title to the note sued on, is insufficient, under the code of 1848, to raise the question as to the plaintiff's right to sue as receiver.

Where a note, not negotiable, is indorsed by the payees, generally, such indorsement does not amount to a *guaranty, it seems.*

In such a case the payees may be treated as *indorsers*; and where that can be done, *it seems* the holder has no option to proceed against them as *guarantors*. In a suit upon a note thus indorsed, against the makers and indorsers, presentation of the note by the owner need not be averred.

An action will not lie upon such a note, by the indorsee, against the makers and indorsers jointly.

THIS cause came on for argument on demurrers put in separately, by Low and Artcher, to the complaint. The complaint stated "that on the 17th day of July, 1848, the plaintiff was, by an order of the court made pursuant to statute, appointed receiver of the Canal Bank of Albany, and that before that time, the defendant Abel I. Seaton made and signed a promissory note of which a copy was subjoined; and that the defendants Francis Low and Edward Artcher, by the partnership name of Low & Co. indorsed such note, and transferred and delivered the same

White *v.* Low.

to the said Canal Bank of Albany, and the said defendants Francis Low and Edward Artcher thereupon guarantied to the said Canal Bank of Albany the punctual payment of the said note, according to the terms thereof. And that on the 27th day of April, 1848, being the day on which the said note became due, the same was presented at the Montgomery County Bank, and payment demanded, which was refused, and notice thereof was on the same day given to the said defendants Low and Artcher, and yet the defendants had not paid, and the plaintiff demands judgment," &c. A copy of the note was annexed to the complaint as follows: "Four months after date, for value received I promise to pay to Low & Co. four hundred dollars, payable at the Montgomery County Bank. Johnstown, Dec. 24, 1847. (Signed) Abel S. Seaton. (Indorsed) Low & Co."

The demurrers were special, and specified as grounds of demurrer that the note was not negotiable, and that it was not averred that the plaintiff, or the Canal Bank, was assignee or representative of Low & Co. so as to give either of them a right of action. That although it was alledged that Low and Artcher guarantied the note, yet the plaintiff showed no right to bring the action on the guaranty, or on the note, against all the defendants jointly; nor did it appear that said guaranty was in writing, or upon any consideration. That it did not appear that the Canal Bank owned the note at the time the plaintiff was said to have been appointed receiver; nor did it appear that the plaintiff had any right or title to the note; nor did it appear that the note was presented for payment, on behalf of any one having a right to the note; nor that notice of non-payment was given to the indorsers by the plaintiff or any one having any interest in, or right to, the note. And Low added, that it did not appear that the note was made or indorsed, or guarantied, at or prior to the time when it was alledged to have been payable and presented for payment. And that there was a misjoinder; as the action against Low and Artcher on the guaranty could not be joined with an action against the maker. Joinder in demurrer.

White v. Low.

Lawing & Pruyn, for the plaintiff.*Dean & Newland*, for Artcher.*Edwards & Parmelee*, for Low.

HAND, J. It is said that the plaintiff shows no title to sue. The plaintiff, when he sues as receiver, should at least state the place of his appointment, and distinctly aver that he has been appointed by an order of the court. Alleging that he was duly appointed on such a day, is not sufficient. (*Gillet v. Fairchild*, 4 *Denio*, 80.) The defendant can insist that the facts constituting the appointment, as set out, shall be sufficient to show one has been made, and that these facts be so set out as to be triable. But I do not think this cause of demurrer sufficiently assigned. These pleadings were put in under the code of 1848; and that required such causes of demurrer to be distinctly stated, or they might be disregarded. (§§ 123, 127. *And see Amended Code*, § 145.) Here it is merely stated that it does not appear that the plaintiff had any title to the note when the suit was commenced. Notwithstanding what was said in *Herrick v. Carman*, (12 *John.* 159,) *Tillman v. Wheeler*, (17 *Id.* 326,) and *Seymour v. Van Slyck*, (8 *Wend.* 403,) and I may add in *Prosser v. Luqueer*, (4 *Hill*, 420,) I think this is not a guaranty. The defendants Low and Artcher, as we shall see, can be treated as indorsers; and the better opinion now is, that where that can be done, there is no option with the holder. If indorsers, they have all the privileges of indorsers, and not of guarantors. (*Hall v. Newcomb*, 7 *Hill*, 416. *Spies v. Gilmore*, 1 *Const.* 321.) And see *Brown v. Curtis*, (2 *Id.* 227, *Bronson, J.*;) *Durham v. Manrow*, (*Id.* 533, *Jewett, C. J.*) It was not necessary to aver presentment of the note by the owner, personally. Such is not the established form, (2 *Chit. Pl.* 158, 9,) even if an averment of presentment is necessary. (*Seymour v. Van Slyck*, 8 *Wend.* 404.) The chancellor, in *Hall v. Newcomb*, thought demand and notice necessary in these cases. But Low and Artcher, having indorsed the note, became liable,

White v. Low.

as indorsers, to the Canal Bank, to whom they transferred and delivered it, and, consequently, to the plaintiff as receiver. Before the code, they could not thereby transfer the legal title to the note to the Canal Bank, as against Seaton the maker. (*Story on Bills*, § 199. *U. States v. White*, 2 *Hill*, 63.) But although not negotiable, by indorsing it, they conferred upon the Canal Bank such right of action, as against themselves. (*Story on Bills*, § 199. *Chit. on Bills*, 196, 241, 2. *Seymour v. Van Slyck*, 8 *Wend.* 404. *Hill v. Lewis*, 1 *Salk.* 132. *And see Plimley v. Westley*, 2 *Bing. N. C.* 249.)

There is, therefore, no valid objection to a recovery by the plaintiff in a suit against Low and Artcher. And although there is properly no privity of contract between the Canal Bank and the maker, in a court of law, yet it would seem that the Canal Bank, as assignee of a chose in action, can maintain a suit against Seaton, under the code. (*Code of 1848*, §§ 91, 2, 3; *Amended Code*, §§ 111, 112, 113.) For some purposes the code, perhaps, gives every chose in action this attribute of negotiable paper.

But the objection to a recovery by the plaintiff in this case is, that he has joined distinct causes of action in the same suit. Upon this point the demurrer is well taken. Seaton made no contract to pay the note to the Canal Bank. And that bank, and consequently the receiver, must sue him as assignee: whereas the suit against Low and Artcher is by the indorsee against the indorser. The rights of parties, in cases of indorsements, are very different from those acquired by assignment. The indorsement in this case, too, is equivalent to a new note, and is a distinct contract. So much so, that in *Plimley v. Westley*, (*supta*), it was held that a new stamp was necessary. Possibly a surety or guarantor, liable contingently, may be made a party in some cases, on the ground of his liability over, as is sometimes done in equity; but as to that I give no opinion. Although the practice of the two courts is assimilated, principles applicable only to suits at law, and those applicable only to cases in equity, in many cases remain as before; and are distinct and well defined. And contracts can not be changed, nor rights de-

The People *v.* Benton.

stroyed, by a change of remedies. The remedy in this case is at law, and the rules applicable in such cases govern, except when changed or abrogated by statute. I find nothing in the code doing either in this case. On the contrary, such misjoinder is impliedly inhibited. (*Code of 1848*, §§ 99, 143; *Amended Code*, §§ 119, 167.) And particularly, by the code of 1848, the cause of action joined must "equally" affect all the parties; though I think the misjoinder here as fatal under the phraseology of the amended code. It follows that the suit can not be maintained against Low and Artcher jointly with Seaton.

There must be judgment for the defendants; with leave to the plaintiff, if he shall be so advised, to amend upon the usual terms.

Judgment for the defendants.

HERKIMER SPECIAL TERM, October, 1849. *Gridley*, Justice.

THE PEOPLE, *ex rel.* Johnson and Butler, *vs.* BENTON and others.

What classes of canal contracts are within the provisions of the act of May 12, 1847, in relation to the public works, authorizing the insertion of a clause in all contracts made in pursuance of that act, for the speedy and equitable adjustment of all questions relative to the performance, or otherwise, of such contracts.

A canal contract contained a provision that for the speedy and just settlement of such contract the resident engineer should determine the amount or quantity of the several kinds of work to be paid for, under the contract, and the amount of compensation, and should present an account of the same to the canal commissioners; and that in case either of the parties should consider such final account incorrect, or that it was unjust to either of the parties, arbitrators might be selected, who should investigate the matters complained of, and determine all questions that might arise relating to compensation for work done under such contract. A submission to arbitrators was made, in pursuance of this provision in the contract. *Held*, that by the terms of the contract the matter to be submitted to the arbitrators was the "final account" made out by the engineer; and that the arbitrators, though they might correct the errors of the en-

The People *v.* Benton.

gineer, could not extend their investigations beyond such "account," and take cognizance of independent claims.

Held also, that the true interpretation of such submission, and of the power contained in the contract under which the same was made, was that the arbitrators were to determine how much work had been performed; how much of each kind of work; what the compensation should be, for each part and parcel of the said work; and whether the "final account" presented by the engineer was correct, and just to the parties respectively.

DEMURRER, by the relators, to the return of the defendants to a writ of mandamus. The facts are stated in the opinion of the court.

A. Loomis, for the relators.

L. Ford, for the defendants.

GRIDLEY, J. This case comes before the court upon a demurrer to the return to a writ of mandamus issued at the suit of the relators against the defendants, commanding them to proceed, and award upon certain claims presented and proved by the relators, or show cause why they did not. It appears from the writ and return that the relators, on the 26th day of July, 1847, entered into three contracts with the canal commissioners, for the construction of two aqueducts and one lock on the Erie Canal enlargement. Those contracts respectively contained a provision for submitting certain questions to arbitrators, to determine, and the submission under consideration was made in pursuance of this provision, which is in the following words: "And to provide for the speedy and just settlement of this contract it is hereby further mutually agreed that the resident engineer for the time being in the employ of the canal commissioners, on the work herein contracted for, shall in all cases determine the *amount or quantity of the several kinds of work which are to be paid for under this contract*, and the *amount of compensation to be paid therefor*; and shall within twenty days after the work shall, in all respects, have been completed, according to the terms and conditions of this contract, present an *account of the same* to the canal commissioners; and in case either of

The People v. Benton.

the parties to this contract shall be of the opinion that the *final account when made and presented as above*, shall in any respect be *incorrect*, or that it is *unjust to either of the parties concerned*, having reference to the terms and conditions of this contract, the canal commissioners may, in their discretion, select the division engineer or any other disinterested person, and the aforesaid contractor shall select any discreet freeholder residing in the county where the work embraced in this contract is located, and who shall have no interest direct or indirect in the matter to be submitted to him for decision, and the two thus chosen shall select another of like qualifications as the person last mentioned, and the persons so selected shall investigate the matters complained of, and determine all questions that may arise relating to *compensation for work done under this contract*; and when so made shall be binding as well on the part of the canal commissioners as the aforesaid contractors, and shall be in all respects final and conclusive."

The arbitrators awarded in part, but refused to make any award upon a large class of claims presented by the contractors, upon the ground that they doubted whether they had jurisdiction over those claims, under the submission. The rejected claims are set forth in Schedule B. annexed to the return, and have been presented by the counsel for the relators as embraced in three classes. 1st. Increased labor and expense of performing work in a manner different from that contemplated in the contract, in consequence of changes in the plan; and extra work ordered or caused by the state officers. 2d. Prospective profits on work embraced in the contract, but withheld and dispensed with. 3d. Increased expense of work by reason of delays in presenting plans, &c. and other hindrances.

There is no difficulty in understanding the nature of the claims set up, except a few of those enumerated by the counsel of the relators under the first of the aforesaid divisions. As characterized by the counsel in his points, it *would seem* that the arbitrators refused to decide upon a claim for *extra work done*, by order of the state officers. I did not understand the counsel to insist, in his argument, that such claims were reject-

The People v. Benton.

ed, and I think the language of the return forbids such a construction. The claims were rejected because they did not relate to "*compensation for work done*," &c. nor "*to the amount of compensation*," &c. nor "*for compensation for materials found*," nor for "*extra work done*," &c. The testimony was before the arbitrators, and they were able to understand more perfectly than I can, the meaning of the obscure language in which several of the claims enumerated in schedule B. are expressed.

Two questions are made upon this argument.

I. Whether the contracts under which the claims of the relators arose are within the provisions of the act authorizing the insertion of a clause for "the speedy and equitable adjustment of all questions relative to the performance, or alteration of any of the contracts" contemplated by the act. (*Laws of 1847*, p. 314, 317.) By the 11th section of this act, it is provided that "all contracts made IN PURSUANCE OF THIS ACT," shall contain the above mentioned provision. The question then is, whether the relators' contracts were made in pursuance of the act in question. This leads us to examine the provisions of the act, in order to determine what classes of contracts were authorized by it; for the provisions can not be construed, as was argued by the counsel for the relators, to extend to *all* canal contracts thereafter made. If that had been the intention of the framers of the act, it would have been easy to express that intent. But they have not done so. On the contrary, they have restricted the application of the provision to *such contracts only* as are made *in pursuance of the act* under consideration. What then is the class of contracts contemplated and authorized by this act? The object of the act was to provide more stringent rules to ensure the fidelity of certain officers and agents of the state engaged upon our canals; and to change the entire system which had existed up to that time, under which canal repairs had been made. Formerly these repairs had been made by the state, under the direction of the superintendents. By this act this work was to be done by contract, upon proposals made on due public notice given by the superintendents in the

The People v. Benton.

newspapers designated to publish the laws in each county through which his section of the canal passed, of the day and hour when sealed propositions would be received. This, therefore, is the class of contracts embraced in and provided for by the act in question. It is true that the last clause of the 5th section directs the canal commissioners to contract for the rebuilding of locks, bridges, and other structures on the finished canals, on sealed propositions, except during the season of navigation. And by the 13th section it is enacted that the regulations of the canal board, made in pursuance of the directions contained in the preceding sections of the act, shall apply to all proceedings of the commissioners and engineers in giving notice and receiving propositions in relation to any of the public works. With these exceptions, all the provisions of the act in question respecting canal contracts relate exclusively to the contracts for canal repairs; and by the 13th section all work done under contracts connected with the Erie Canal enlargement, is to be kept distinct as far as practicable, from the ordinary repairs of the canal by the superintendents. From an attentive examination and consideration of the several sections of the act, I have thus been led to the conclusion that the contracts under consideration, being for work to be done upon the Erie Canal enlargement, were *not* contracts made *in pursuance of the act in question*. They were made in pursuance of provisions contained in the revised statutes. The act referred to created a new class of canal contracts, before unknown in our canal system; and that is the class contemplated by the act, and which alone can be said to be made in pursuance of it.

These views have been strengthened and confirmed by looking into the history of the legislation which resulted in the enactment of this statute. It had its origin in the extraordinary developement of a system of stupendous frauds that had been committed, in collusion with the agents of the state upon the line of the Genesee Valley canal. The legislative documents of the year 1847 contain three reports upon the subject matter of this act. Senate Document No. 63 is the report of the majority of the canal committee, and it is adverse to the proposed

The People *v.* Benton.

change. Document No. 79 is the report of Senator Beach, from the minority of the said committee, and is in favor of the alteration adopted in the act in question. Document No. 125 is the report of Mr. Jones on behalf of the canal commissioners, and made in the fall session of 1847, to whom the subject was referred on a petition for the repeal of the law after a brief experiment of its operation. Now these reports all relate to the proposed change in the mode of making canal repairs, and are occupied with arguments upon the expediency or inexpediency of adopting the mode of advertising for proposals, and performing the work by contracts, as is directed in the act. Not one word is said on the subject of changing the mode of settling and adjusting the claims of contractors by a resort to a board of arbitrators instead of an application to the canal board or to the legislature for relief. Had it been the intention of the members of the committee who framed the act in question, or of the legislature which passed it, to effect a change so radical and so universal, in relation to the determination of claims under canal contracts, as to abolish the jurisdiction of the canal board, and to establish a new tribunal consisting of a board of arbitrators, it would at least have been discussed in the full and elaborate reports to which I have referred. And it is also reasonable to conclude that the legislature would have provided directions in detail for the constitution of this new tribunal, and not left so important a power to be exercised under a provision so obscure and indefinite as that contained in the 11th section of the act in question. My judgment, therefore, is that the section in question was thrown into the act without much consideration, and was intended solely to provide some easy mode of facilitating the settlement of claims under the particular class of contracts contemplated by the act.

II. A second question relates to the *terms of the submission* under which the arbitrators acted; and is independent of the proposition which affirms that the act of 1847 has no application to the contracts under consideration; and of the point, whether the words of the 11th section are not so general as to authorize the insertion of a broader provision in the contract, and a broader

The People v. Benton.

submission under it. It is not a question whether, under the statute, (conceding its application to these contracts,) a provision might have been inserted embracing the rejected claims; but whether the submission does in fact embrace them. To determine this point we must examine the different clauses of the provisions contained in the contracts, and on which the submission is predicated, and to which it is limited. In the first place, we find the duty of the engineer confined to the determination of the *amount* and *quality* of the several kinds of work to be paid for under the contract, and the *amount of compensation to be paid therefor*. Clearly then the engineer had nothing to do with the subject matter of the rejected claims. His duty lay within the narrow limits prescribed by the contract. This account is to be presented by the engineer to the canal commissioners, and is called the "*final account*." And in case either party is of the opinion that this "*final account*" is "*incorrect*" or "*unjust to either of the parties*," "*having reference to the terms and conditions of the contract*," the parties may select arbitrators in the manner prescribed in the contract. Now it seems to me quite clear, that the matter to be submitted to the arbitrators was the "*final account*" made out by the engineer, and that the arbitrators (though they might correct the errors of the engineer) could not extend their investigation beyond the "*account*," and take cognizance of independent claims—such as those which the arbitrators rejected from their consideration. This conclusion will be still more clear, when we consider, in the next place, the precise subject matter upon which the arbitrators, by the very terms of the submission, were directed to award. That is stated in these words: "*and determine all questions that may arise relating to work done under this contract*." In other words, they are to determine how much work has been performed; how much of each kind of work; what the compensation shall be for each part and parcel of the said work; and in fine, whether the "*final account*" presented by the engineer is correct and just to the parties respectively. Such, in my judgment, without extending the discussion further, is the true interpretation of the terms of the submission, and the pow-

Foreman *v.* Foreman.

ers contained in the contract under which it was made. The result is that the defendants are entitled to judgment on the demurrer.

Judgment for defendants.

ONONDAGA SPECIAL TERM, October, 1849. *Mason, Justice.*

SAMUEL FOREMAN and others *vs.* JOSHUA FOREMAN and others.

It was the intention of the legislature, by the statute authorizing the sale of lands belonging to infants, to preserve the funds produced from the sale, in the character of real estate; in order that it might go to the representatives of the infant, who would have taken it as real estate.

Under that statute, the proceeds of the sale of infants' real estate, are, for all the purposes of distribution, to be regarded as real estate, in case the infant dies before attaining his majority. *Per MASON, J.*

And the statute having impressed such proceeds with the properties of real estate, for the benefit of heirs, its provisions will continue to operate upon the estate, upon the death of the owner, after he becomes of age; in the absence of any act or intent, on his part, changing the character of the property.

Accordingly, where, upon a sale of the real estate of an infant, a bond and mortgage was given by the purchaser, upon the same premises, to secure the purchase money, and the infant died, after he attained his majority, being still the owner of such bond and mortgage, it was *held* that the moneys secured thereby and which remained unpaid at the time of his death, belonged to his heirs, and must be distributed among them as real estate, according to the statute of descent.

CHARLES W. FOREMAN, deceased, being an infant, and being seized of certain lands in the county of Onondaga, by his general guardian Laban Hoskins, presented a petition on or about the 21st day of July, 1834, to the vice chancellor of the seventh circuit, for the sale thereof. And such proceedings were had thereon that said lands were sold to Richard Adams, for three thousand dollars, and to secure the purchase money a bond and mortgage was by order of the court executed by Adams to said Laban Hoskins, guardian as aforesaid, in trust for the said

Foreman *v.* Foreman.

Charles W. Foreman, bearing date January 29th, 1835, payable in 12 years from the 1st of April then next, with annual interest. On the 1st day of October, 1847, the said Charles W. having attained his majority, made a settlement with his said guardian in relation to the interest received upon the bond and mortgage. No part of the principal of the said bond and mortgage was then paid. The bond and mortgage was produced and laid upon the table where the parties were doing their business, and the said Charles W. gave the said Laban a release from all liabilities growing out of his trust as such guardian, and acknowledging therein the receipt of the said \$3000 bond and mortgage, but the said bond and mortgage was not assigned over to the said Charles W. by the said Laban, nor delivered in any other manner than above stated. The said Charles W. at the same time gave to the said Laban a power of attorney, authorizing him to hold the said bond and mortgage, and receive the interest thereon, and in his discretion to receive or collect the principal if he thought it best so to do. The whole matter was left to his discretion; he retaining the bond and mortgage. The matter rested in this situation up to about the 14th day of March, 1848, when the said Charles W. departed this life, intestate, having made no other disposition or change of said bond and mortgage than is above stated. On or about the 11th day of April, 1848, letters of administration were granted upon the estate of Charles W. Foreman, to the plaintiffs. And on or about the 12th day of April, 1848, the said Laban Hoskins continuing to hold the said bond and mortgage, the whole amount of principal and interest being due, did under his hand and seal transfer the said bond and mortgage to the plaintiffs as administrators, as aforesaid. And the plaintiffs commenced this suit, and summoned the heirs and next of kin, and asked the judgment of this court whether the moneys secured by the bond and mortgage, should be distributed according to the statute of distributions, or the law of descents.

J. Foreman, for the plaintiffs.

Underwood & Clarke, for the defendants.

Foreman v. Foreman.

MASON, J. Courts of equity, for the purpose of protecting the rights of parties, who as heirs or distributees, would otherwise be entitled to the fund, are careful not to permit guardians to change real estate into personal, or personal into real. And with that view it is the constant practice of the courts to hold lands purchased by the guardian, with the infant's personal estate, or the rents and profits of the real estate, to be personality and distributable as such; and on the other hand to treat real property turned into money as still, for such purpose, real estate. (2 *Story's Eq. Jur.* § 1357. 6 *Ves. R.* 6. 2 *Id.* 265, note 2. 1 *Id.* 257. 19 *Id.* 123.) And Lord Eldon says, in the case of *Ex parte Philips*, (19 *Ves. R.* 123,) that "in the case of an infant, it is settled that as a trustee out of court can not change the nature of the property, so the court of chancery, which is only a trustee, must act as the trustee out of court." And consequently, when the court directs a change of the property of an infant, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original estate. (2 *Story's Eq. Jur.* 1357.) These are the principles which governed the courts of equity in the absence of any statutory provision. It is provided, however, by statute, in this state, that no sale of the real estate of an infant shall give to such infant any other or greater interest or estate in the proceeds of such sale, than he had in the estate so sold, but the said proceeds shall be deemed real estate of the same nature as the property sold. (2 *R. S.* 196, § 186.) I am satisfied that the intention of this statute was to preserve the funds produced from the sale of infants' real estate, in the character of real estate, in order that it might go to the representatives, who would have taken it as real estate. This was adjudged to be the intent of the statute by Vice Chancellor Sandford in the case of *Davison v. De Freest*, (3 *Sandf. Ch. Rep.* 456, 464.) This, it seems to me, is apparent from the language of the statute itself. And besides, the revisers, in their notes, (3 *R. S.* 675,) refer to the session laws of 1815, from which this provision is taken, and which statute declares that "*the proceeds of such real estate shall be considered relative to the statute of descents, and*

Foreman *v.* Foreman.

distributions, and for every other purpose as if the said real estate had not been sold." There can be no doubt, in my opinion, but we are, under this statute, to regard the proceeds of the sale of infants' real estate, for all the purposes of distribution, as real estate, in all cases where the infant dies before he attains his majority. And I am inclined to think that the statute having impressed the funds secured by this bond and mortgage with the properties of real estate, and that too for the benefit of heirs, the statute must be deemed to have its operation upon the estate, even upon the death of the party after majority attained. It seems to me this must be so in all cases, in the absence of any act or intent of the deceased changing the character of the property. It is a familiar rule in equity jurisprudence, that moneys being once impressed with real uses, and one of those uses being for the benefit of the heir, the impression for his benefit shall remain. (*Wheldale v. Partridge*, 8 *Ves.* 227, 235. 2 *Story's Eq. Jur.* § 214.) In the case of *Wheldale v. Partridge*, Lord Eldon said: "Money being once clearly and plainly impressed with real uses, as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit." Again he says, "To put an end to that impression it must be shown either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either." And the following cases may be referred to as sustaining the same doctrine. (*Walter v. Maunde*, 19 *Ves.* 424, 428, 429. *Biddulph v. Biddulph*, 12 *Id.* 161. *Wheldale v. Partridge*, 5 *Id.* 388. *Thornton v. Hawley*, 10 *Id.* 130. *Lowes v. Hackward*, 18 *Id.* 168, 171. *Lingen v. Sowray*, 1 *P. Wms.* 172. *Edwards v. Countess of Warwick*, 2 *Id.* 171. 1 *Ves.* 204, notes 1, 2, 3. 1 *Brown's Ch. Rep.* 238.) The rule is a familiar one that statutes are to be construed in reference to the principles of the common law in force at the time of their passage; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. (1 *Ken's Com.* 464, 3d ed.) Applying this rule to the case under con-

Foreman *v.* Foreman.

sideration, it is but fair to presume that when the common law said that money once impressed with real uses for the benefit of the heir, the impression shall remain for his benefit, unless the intent on the part of the deceased to change its character is made to appear, the legislature must be presumed to have intended, by the statute under consideration, which impresses real uses for the benefit of the heir upon the moneys arising from infants' real estate sold, that such impression shall remain, unless the intention of the infant to devolve a different character upon it, expressed after he obtained his majority, be made to appear.

It seems to me quite clear that the statute under consideration impresses real properties and uses upon the bond and mortgage in question, for the benefit of the heir during the minority of the infant, absolutely; and that such impression will remain after he has attained his majority, down to the time of his death, unless his intention to change its character be shown. And it is sometimes a question of nice consideration and intrinsic difficulty to determine what circumstances do or do not amount to proof of an intention to convert real property into personal, or personal into real. (2 *Story's Eq. Juris.* § 1214.) Assuming, then, that if Charles W. Foreman had died before he attained his majority, the moneys secured by the bond and mortgage in this case would have to be distributed by the plaintiffs to his heirs at law, upon whom the real estate would have descended, it becomes important to inquire whether the case before the court discloses any intention on his part to change its character, or to devolve upon it a different direction. I feel constrained to say, after a careful examination of this case, that I have not been able to discover the evidence of such intention. The fact of his settling with his guardian and giving a release from all liabilities growing out of his trust duties, and acknowledging in the same release the receipt of the bond and mortgage by himself, and the giving back the bond and mortgage to his guardian, with the power of attorney, all of which transactions and instruments must be read together in determining the rights of these parties, did not change in any respect, in my

Foreman *v.* Foreman.

opinion, the character thereof, or afford any evidence of his intention to convert or change it. The power of attorney does not show that he intended to change it. It is true he confers upon Mr. Hoskins, by this instrument, the power to receive the interest on the bond and mortgage; and he authorizes him, whenever in his discretion he shall think proper, to receive or collect the principal, and upon the receipt thereof to reinvest and loan out the same; not, however, in any manner either directing him to receive it, or collect, or reinvest it, but leaving it entirely to his discretion. And besides, this bond and mortgage was given to Hoskins, the guardian, for the benefit of Charles W. and was never by Hoskins assigned over to him; and it should be borne in mind that the bond and mortgage was given upon the very land of the infant which was sold, and to secure the purchase money; and the purchase money therefore may be said to have always remained a lien upon the land. When the law has impressed real properties and uses upon moneys, it is necessary, in order to put an end to that impression, that it be shown either that the party entitled to the property and having a right to elect in what shape he will take it, has declared that election, or done some act denoting his intention in relation thereto; or the property must, according to an expression used in some of the cases, *be at home*; that is, the person being the absolute owner must have in himself the entire qualification of heir and executor. He must not only have the *jus in re*, but no other person must have an outstanding *jus ad rem*. In that case, if he makes no declaration of his intention in relation to it, it shall go according to the quality in which it was left at his death. (1 *Brown's Ch. R.* 238, note 21, and cases there cited; also 7 *Bro. P. C. Toml. ed.* 530.) In accordance with the principles above laid down, it was adjudged in the case of *Scull v. Jernigar*, (2 *Dev. & Bat.* 44,) that the proceeds of land sold, to which an infant is entitled, remains real estate until the infant comes of age and elects to take them as money; and that if the infant be a female and marries, and her guardian to whom the proceeds of such sale had been paid by order of the court of equity, pays the same to

Vanderwerker v. Vanderwerker.

her husband, upon her death they will descend as land to her real representatives ; and this whether she married and died before or after she become of age ; provided in the latter case she never elected herself, while sole, to take such proceeds as money, nor consented in the manner provided by law, after marriage, that her husband should so take them. I am of opinion, therefore, for the reasons above stated, that the moneys in this case must be distributed according to the statute of descents ; and I direct a judgment accordingly. The moneys may be paid into court and thus distributed.

SARATOGA SPECIAL TERM, October, 1849. *Willard*, Justice.

LAWRENCE VANDERWERKER vs. ADAM VANDERWERKER
and others.

Where a devise of lands, in a will executed previous to the revised statutes, contains no words of inheritance, only a life estate passes to the devisee.

The introductory clause of a will evincing the intent of the testator to dispose of all his worldly estate, will not have the effect to enlarge the estate devised ; unless the words of disposition in the clause of devise, are connected, in terms or sense, with the introductory clause, and import more than a mere description of the property.

A charge, in order to carry a fee, by implication, when the devise is without words of limitation, *must be upon the person of the devisee, in respect to the lands devised.*

Who are necessary parties to a bill for a partition.

When, and on what terms, bills for partition may be amended.

THE bill in this cause was filed for the partition of three several pieces of land, of which it was claimed that the parties were tenants in common, as the heirs, and grantees of the heirs, of Abraham Vanderwerker, a deceased brother of the plaintiff, who died in the fall of 1841, intestate. The title of Abraham Vanderwerker to the lands in question was derived from the last will and testament of his father Hendrick Vanderwerker, bearing

Vanderwerker v. Vanderwerker.

date June 9, 1815. Hendrick, the testator, died on the 24th of April, 1816. The bill alledged that Abraham took a fee, under the will, and the respective rights of the parties as set forth in the bill, rest upon that assumption.

The bill was taken as confessed by all the defendants except certain infant heirs. Susan Bloore, the infant heir of Joshua Bloore deceased, put in an answer, by her guardian, in which she insisted that Abraham Vanderwerker took only a life estate under her father's will.

J. Lawrence, for the plaintiff.

Geo. W. Kirtland, for the defendants.

WILLARD, J. The first question to be examined in this case is as to the true construction of the will of Hendrick Vanderwerker, with respect to the devise to Abraham. The testator, by his will, devised all his estate, real and personal, to his wife during her widowhood, charged with the payment of his debts and the support of his minor children, and after her death he devised specific portions of his real estate, described by metes and bounds, to each of his sons, Rolf, Peter, Lawrence, Adam and Cornelius, and to their heirs and assigns forever. He devised his grist mill to his sons George and Henry, charged with the payment of \$250 to each of his daughters Getty, Anna and Maria, in one year after the death of his wife; and he directed that if any debts should remain, after the death of his wife, justly chargeable against the estate thereby devised, they should be paid, one half by George and Henry, and the other half by the other sons before named. He also gave to Henry one acre of land adjoining to the west of his lease lot, with an equal share of the wood lot on the north side of the road, and one acre of the island. Then follows the devise to Abraham, which is in these words—"And I do hereby give and bequeath unto my unfortunate son Abraham, who seems to have such an impediment that I think he will never be able to get his living, a certain part of the farm whereon I now live, [describing it by

Vanderwerker v. Vanderwerker.

metes and bounds,] the said piece of land to be under the immediate care of my executors hereinafter named, and to be kept by them for the purpose of supporting the said Abraham; and further, that the rent arising yearly for the use of the ground and water for the carding machine to be under the care of my executors, and to be appropriated for the support of the said Abraham, with one quarter of an acre of land just east of Rolliif's dwelling house, for a building lot. And admitting that the said Abraham should, after he arrives to full age, be capable of acting and conducting business for himself, then and in such case the executors are released from any further care by putting the said Abraham in possession of the property hereby willed unto him. *And it is to be understood that all the landed property, with the mills hereby willed and bequeathed unto the several male heirs hereinbefore named, is willed and bequeathed subject to maintenance of my unfortunate son John Vanderwerker, who, from his habits of intemperance, is incapable of taking care of any property, and that the said John have his liberty to live with any or either of his brothers, as may best suit him; any thing herein to the contrary notwithstanding.*" The testator's son Abraham was *non compos mentis* at the date of the will, and so continued until his death.

There are no words of inheritance in the devise to Abraham, as there are in the devises to the other heirs; and as the will took effect in 1816, it is contended that only a life estate passed to Abraham; and such is the general rule of law. But the plaintiff insists that the introductory clause of the will affords evidence that the testator intended that a fee should pass to Abraham. The language is, "as touching such worldly estate as it hath pleased God to bless me with in this life, I do give and dispose of the same in the following manner and form." It is fairly deducible from the decision of the court of errors in *Barheydt v. Barheydt*, (20 Wend. 576,) that the introductory clause of a will evincing the intent of the testator to dispose of all his worldly estate, has not the effect to enlarge the estate devised, unless the words of disposition in the clause of devise are connected, in terms or sense, with the introductory clause,

Vanderwerker v. Vanderwerker.

and import more than a mere description of the property. The cases on this point are well collected and reviewed by Barculo, J., in *Olmsted v. Harvey*, (1 Barb. S. C. Rep. 109,) which was affirmed by the court of appeals. (1 Comst. 483.) This case is in point, and settles the question against the construction contended for by the plaintiff.

It is contended in the next place, that Abraham is *personally* charged with a proportionate share of the support of John, and that the devise for life is thus, by implication, enlarged into a fee. I do not so understand the devise to Abraham. The devise to him was intended for his support, and the executors were made his trustees. There is no charge in the will either upon him, personally, or upon the estate devised to him. The whole will must be taken together. It can hardly be supposed that the testator intended that John should reside with his son Abraham, who was then an infant and an idiot, and for whose support he had just made a provision. The will is satisfied by referring that clause to the other brothers of John, to whom the other portions of the testator's estate were given in fee.

But again; a charge, to carry a fee, by implication, when the devise is without words of limitation, *must be upon the person of the devisee, in respect to the lands devised*. This was so held in *Olmsted v. Harvey*, (1 Barb. S. C. Rep. 102,) and affirmed on appeal. (1 Comst. 483.) This doctrine is well established. (See *Spraker v. Van Alstyne*, 18 Wend. 205; *Fox v. Phelps*, 17 Id. 393; *Jackson v. Ball*, 10 John. 143; *Barheydt v. Barheydt*, 20 Wend. 580.) There is no charge, in this case, of the support of John upon the person of Abraham. There is therefore no ground for enlarging the life estate into a fee. Abraham took merely an estate for life in the several premises devised to him; and as the remainder was undisposed of by the will, it descended to the heirs of the testator, subject to the life estate of Abraham. None but the heirs of the testator Hendrick, and those who have succeeded to their rights, were proper parties to the bill.

It is set up on the part of the defendants, and is proved, that Joshua Bloore, in his lifetime, acquired the titles of Henry H.

Vanderwerker v. Vanderwerker.

Vanderwerker and wife, Peter H. Vanderwerker and wife, Adam Vanderwerker and wife, and Roliff H. Vanderwerker, making in all, four-ninths of the premises in question. Bloore died in 1843, leaving a widow and one child, Susan, an infant. Of course, Susan is entitled to four-ninths of the premises, subject to the dower of her mother therein, and to the dower of Margaret, the widow of Roliff Vanderwerker, in one ninth of the same. George Vanderwerker, one of the heirs of Hendrick, was entitled to the one ninth in the two first pieces of land, but having, in 1836, conveyed his interest in the carding machine property to Elijah House, those who have succeeded to the rights of the latter should be made parties, with respect to that property. Elijah House died intestate. The widow intermarried with Wm. T. Seymour, and is entitled to be endowed in the one ninth of the carding machine lot and water power. His four children, Abbe M., James, Ira, and Elijah S., are each seised in fee in the undivided one third of one ninth of the same property, subject to the right of dower of their mother. The other heirs of the testator, Lawrence the complainant, Henry G. Walden and Getty his wife in right of the said Getty, John Fox and Maria his wife in right of said Maria, are each seised of an undivided one ninth of said premises. Jesse D. Vanderwerker and Caroline Vanderwerker the children of the said Cornelius, a deceased son of the testator, are each seised of an undivided one half of one ninth of said premises.

The above are all the persons who are necessary parties to the bill. The grantors of Bloore are not proper parties. No relief is prayed for or against them in that character, and having parted with their title they have no concern in the partition. It is quite obvious that the bill, in its present shape, can not be sustained. (*Burhans v. Burhans*, 2 Barb. Ch. Rep. 407.)

The remaining question is whether the bill should be dismissed, without prejudice, or should be amended upon terms. When the objection to the bill, for defect of parties, is taken in the answer, the complainant, if the objection be true, should amend and bring the requisite parties before the court, and dismiss his bill as to those who are improperly made parties. If

Vail *v.* Vail.

in such case he lies by till the hearing, the court will dismiss the bill altogether, unless, in its discretion, it will permit an amendment. The practice in this respect is stated at length by the chancellor in *Van Epps v. Van Duesen*, (4 *Paige*, 75, 76.) The policy clearly indicated by the code of procedure is to allow an amendment in cases like the present. (*Code*, § 173.) I shall therefore allow the complainant sixty days within which to amend his bill by adding to and striking out parties, and making such other changes as may thus become necessary, on the payment of the costs which have been incurred by the infant defendant Susan Bloore subsequent to appearance. And on his failing to do so, the bill must be dismissed with costs, but without prejudice.

NEW-YORK SPECIAL TERM, Nov. 1849. *Edmonds*, Justice.

**HENRY VAIL and others, surviving ex'rs of Laurent Salles, vs.
JULIA VAIL and others.**

A testator died, leaving a widow, and six children, some of whom were infants. By his will, executed since the revised statutes took effect, the testator, after giving various pecuniary legacies, directed his executors to invest \$35,000 of his personal estate for the use of his wife, during her life or widowhood, with liberty to her, if she died his widow, to dispose of the same by will, among his children or grandchildren; and if she died without making such disposition, then that the principal should sink into the general residue of the estate. He also directed \$10,000 to be invested for the use of his daughter Mrs. T. for life, with remainder to her two children, or the survivor of them; and if they should both die in the lifetime of their mother, then to such persons as she might by will appoint, or in default of such appointment, that the principal sum should sink into the general residue. The executors were also directed, from the income of his estate, to provide for the support and education of his minor children, until they should respectively arrive at the age of 21 or be married. The testator also gave to each of his five daughters a legacy of \$25,000; those to the married daughters to be paid immediately, and those to the others at the age of 21 or sooner, if they should marry with the consent of the executors. The

Vail v. Vail.

also gave to each daughter a legacy of \$25,000 payable at the age of 25 years. These several legacies were to be paid to the issue of such of the daughters as should die before the same became payable, provided they had any issue living at the time when such payment was to be made; otherwise the legacy was to fall into the general residue. The testator also gave to his son three legacies of \$25,000 each, payable at the ages of 21, 25 and 27. The executors were directed to invest the whole of the personal estate of the testator, except so much as might be necessary to fulfil the requisitions of the will, in their own names for the use and benefit of the testator's children, in the purchase of real estate, or in bonds and mortgages, &c. And when the youngest child should arrive at the age of 25, or as soon thereafter as the widow should die, the executors were directed to sell all the real estate, and then to divide all that remained of the estate among the six children and their issue, in such proportions as to equalize, with interest, the previous advances made by the executors; so as to give to each child an equal benefit from the estate. But this distribution was to be made without reference to the legacy of \$10,000 to Mrs. T. and her children, or to any disposition which the widow might make of the \$25,000 legacy to her. The testator further directed that the several shares so apportioned should be invested in the name of the executors, as trustees for his children respectively, and that the income should be paid to the children for life. And that the portion of each child, after his or her death, should go to his or her issue, if any, and if none, then to be divided among the surviving children, and the issue of such as had died, *per stirpes*; or in such other manner as the child dying without issue might direct.

Held. 1. That although there was no express devise to the executors, yet that a trust was vested in them by implication, for the purposes of the will; a trust being necessary in respect to the real estate, to enable the executors to receive and expend the rents and profits, and as to the personal estate, it being necessary to effectuate the intention to accumulate. And that during the continuance of such trust, the legal estate held by them was inalienable, either by the trustees or by the *cestuis que trust*; at least until the youngest child should attain the age of twenty-one years.

2. That as such trust would not terminate until the expiration of four minorities, the limitation was too remote, as suspending the ownership beyond the termination of two lives in being, and therefore void.
3. That it being manifestly the intention of the testator to have all his estate converted into personal property, before its final distribution among his children, upon the principles of equitable conversion the whole estate was to be regarded as personal property.
4. That although the statute in regard to uses and trusts does not apply to personal property, yet that the statute respecting future estates in lands is applicable; and that under that statute the express trust commencing on the final division of the property among the testator's children was void.
5. That the ultimate disposition of the estate of the testator, in the will, was void; and that as to the residuum, the testator died intestate.

It is now well settled, especially in regard to trusts of personal property, that

Vail *v.* Vail.

where personal estate is vested in trustees upon various trusts, some of which are valid and others void, the courts must separate those which are legal and valid, if they can be separated, from those which are illegal and void.

The judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject matter thereby determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided.

But a former decree, to be a good bar, must have been between the same parties, and for the same subject matter.

Effect of a marriage contracted in France, under the *dotal system*, upon the rights of the husband in the property of the wife, in case of his surviving her.

IN EQUITY. The bill in this cause was filed to obtain the decision and direction of the court as to the construction of certain parts of the will of Laurent Salles, deceased. The testator died in 1833, leaving property of the value of about twelve hundred thousand dollars, one hundred thousand of which was in real estate, and the residue was in stocks, bonds and mortgages, and other personal property. The testator left a widow about 47 years of age, and six children, the eldest of whom was 26 years of age, and the youngest fourteen. By his will, which was made after the revised statutes went into operation, the testator bequeathed about \$15,000 in legacies, to some distant relatives and friends, and to charitable objects. He then directed \$25,000 of his personal estate to be invested for the use of his wife, during her life or widowhood, with liberty to her if she died his widow, to dispose of the same, by will, among his children or grandchildren; and if she died without making such disposition, then that the principal, upon her death, should sink into the general residue of his estate. He also directed \$10,000 to be invested for the use of his daughter, Mrs. Tonnele, for life, with remainder to her two children, or the survivor of them; and if they should both die in the lifetime of their mother, then to such persons as she might by will appoint, or in default of such appointment, that the principal sum should sink into the general residue. The testator also ordered the executors, from the income of his estate, either real or personal, to pay and appropriate such sums as might be necessary for the support and education of his minor children, until they should respectively

Vail *v.* Vail.

arrive at the age of twenty-one, or be married. He also gave to each of his five daughters a legacy of \$25,000; the legacies to the married daughters to be paid immediately, and those to the other three to be paid at the age of twenty-one, or sooner, if they married with the consent of the executors. He also gave to each daughter a similar legacy of \$25,000, payable when they should respectively attain the age of 25 years. These several legacies were to be paid to the issue of such of the daughters as should die before the same became payable, provided they had any issue living at the time when such payment was to be made; and if they had no such issue, the legacy was to fall into the general residue. The testator also gave to his son three legacies, of \$25,000 each, the first payable when he was twenty-one, the second when he was twenty-five, and the third when he was twenty-seven. The executors were directed to invest the whole of the personal estate of the testator, except so much thereof as might be necessary to fulfil the requisitions of the will, in the name of the executors, for the use and benefit of the testator's children, in the purchase of real estate, or in bonds and mortgages, or in certain other permanent securities specified in the will. And when the youngest child arrived at the age of twenty-five, or as soon thereafter as the widow should die, and not before, the executors were directed to sell all the real estate of which the testator died seised, and also that which should have been purchased by them, and then to divide all that remained of his estate among the six children and their issue in such proportions as to equalize, with interest, the previous advances which should have been made by the executors, as directed in the will; so as to give to each child an equal benefit from his estate. This distribution was to be made, however, without reference to the legacy of \$10,000 to Mrs. Tonnele and her children, or to any disposition which the widow might make of the principal of the \$25,000 legacy to her. The testator further directed that the several shares so apportioned should be invested in the name of the executors, as trustees for his children respectively, and that the income should be paid to the children for life. And he directed that the portion of each child,

Vail *v.* Vail.

after his or her death, should go to the issue of such child, if any there was, and if none, then to be divided among the surviving children, and the issue of such as had died, *per stirpes*; or in such other manner as the child dying without issue might by will direct.

Answers had been put in for all the defendants, and it was now insisted that the devise of the residuum was totally void, and that such residue should be distributed among the next of kin by reason of the intestacy *quoad hoc*: that the widow of the testator having married a second time to a M. Morin, in France, and dying, her share in such residue belonged to such second husband, and not to her next of kin, and that the decree in the suit of *Vail v. Vail*, reported in 4 *Paige*, 317, was a bar to the relief sought in this suit.

G. T. Strong, for the plaintiffs.

C. W. Sandford, for the defendants Aaron Vail, &c.

R. Emmett, guardian ad litem for infant defendants.

L. B. Woodruff, for the defendants De Alfaro, &c.

EDMONDS, J. Although there is no express devise to the executors, in the will, yet I entertain no doubt that a trust is created by it.

1. As to the devise of \$25,000 for the use of testator's wife. The executors are to set it apart, and keep it invested for her use, and to pay her the interest *durante viduitate*, with a devise over in case of her death or marriage. In one event it is to go into and form part of the residuum. The legal estate in this sum must necessarily be vested in the executors, while the absolute ownership is thus suspended, and if in them, must be held by them as trustees, for the purposes of the will.

2. As to the devise of \$4000 for Francis Youett. The executors are to invest it—in their own names of course—and pay the interest to him for life, with a disposition over. Until his death,

Vail *v.* Vail.

the executors are to hold the principal in trust for his use, and then to pay it over.

3. The education and support of minor children. This is to be paid for out of the income of his estate, real or personal, until the purpose required is answered, and necessarily involves an ownership in the executors; for it gives them an absolute disposition of the rents, issues and profits, until a certain period, and by virtue of the devise they are entitled to the actual possession and the receipt of such rents and profits. (1 *R. & 727, § 47.*)

4. The devise of \$10,000 for Cecile Tonnele. The principal is to be invested, the income paid her during life, with a disposition over of the principal on her death: in one event it may go into the residuum. Here also is a trust, necessarily, with the legal estate, vested in the executors.

5. The devise of the whole personality. It is to be invested by the executors in their names as such, but for the use and benefit of his children, in the purchase of real estate, or in certain specified securities, for the purposes of the will. Thus the executors become seised of the legal estate in the whole personality, in trust for the purposes of the will. There is no devise of the income of the personality, except as before mentioned, for the education and support of minor children, and to pay over the income of part to Mrs. Salles, Mr. Youett and Mrs. Tonnele; but there is a devise to the executors, of something more than a mere power to sue; they are to convert a part from personality into realty, and finally the whole into personality, and to make partition, and on such partition to invest each child's share in their names as trustees, and pay the income during their lives, and the principal as directed, on their deaths. So that the executors become seised of the legal estate, not only from the necessity of the case, but because they are for a period to receive the rents, issues and profits.

6. The disposition of the personality. To each of his five daughters, \$50,000 at the times specified; such times, in a degree depending on a contingency, and the exercise of a discretion in the executors, and the ultimate payment of the principal

Vail v. Vail.

sum depending upon a contingency, in the failure of which, these sums, or part of them, may go into the residuum. And until all attain the age of twenty-one, the executors must be seized of the legal estate, in trust for the purposes of the will.

7. The disposition of the residuum. As soon as practicable after the youngest child becomes twenty-five, in case of the widow's death, the executors are to make equal partition. On such partition, a trust is created in the executors; for they are expressly directed to invest each one's share of the residuum, in their names as trustees for the children respectively, the income to be paid to the children during their lives, with a disposition over on their deaths. So that it seems to me that every step in the execution of the will, from its first being admitted to probate until the death of the testator's widow and all his children, involves of necessity the existence of a trust in the executors in some form or other, and to some extent.

If there is a trust, the question occurs, is it a valid one? Neither the absolute power of alienation of lands, nor the absolute ownership of personal property, can be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, or which is the same thing in this case, at the death of the testator. (1 *R. S.* 723, § 15. *Id.* 773, § 1.) By tracing the various devises of this will, through the several steps which they may take in their progress to a final and absolute ownership, it will very readily be discovered whether any portion of the estate may be suspended for more than two lives in being at the testator's death.

1. As to the devise of \$25,000 to the widow. In the first instance, the income is given to her during her life, or widowhood, with the power during widowhood, of devising the principal sum to her children or grandchildren. But in case of her death or remarriage, it shall revert to and be a part of his personal estate.

Thus, until this sum shall again flow into the general reservoir of the personal estate, one life estate in it is created. Whether, after it shall have again thus mingled with the resi-

Vail *v.* Vail.

duum, any more than that life estate is created, will be presently examined.

2. As to the devise of \$10,000 to Mrs. Tonnelle. This also may, in case she die, surviving her two children, and without a will, flow into and form part of the residuum, but in the mean time, there has been one life estate—hers, namely—carved out of it. Whether any more than that one, will also be presently considered.

3. As to the \$250,000 devised to the five daughters. The whole of this may, in case of the death of all the daughters without issue, remain in and form part of the residuum, and so may each separate bequest of \$50,000 given to each, but not until each sum of \$50,000 shall have been first subjected to at least one, and as we shall by-and-by see, to perhaps more than one life estate.

4. As to the devise of \$75,000 to the son. This is given absolutely to the son, and is subject to no devise over in case of his death. No life estate whatever is carved out of it, the absolute ownership being given to him in the first instance.

5. As to the real estate. When the youngest child shall attain the age of 25, it is to be converted into personalty, and flow into the residuum.

6. As to the residuum. Thus all the estate, real and personal, of the testator, except the devises to his son, to Mr. Youett, to his relatives in France, and to the two charitable societies named in the will, must or may flow into and form part of the residuum. Is such residuum so devised that several successive estates for life may be carved out of it? It is to be divided into six parts, and each part is to be invested by the executors in their names, as trustees for the several children of the testator; the income and profits of the several parts are to be paid to each child during life, and on the death of any child without issue, its portion is to be equally divided among the testator's surviving children, and the issue of such as may have died.

It seems to me that it was the intention of the testator to make a final disposition on the death of a child without issue; for he directs in the first instance that the allotment shall be for

Vail *v.* Vail.

the benefit of his children and their issue, and in the event of a child's dying without issue, it is the portion set apart for such child, not the mere income of it, or its use for life, which is to be equally divided among the surviving children, and the issue of those who have died, and he accordingly gives and bequeaths such portion, not its income or its use, to such survivors, and the issue of those who are dead, and when he gives his children power to appoint by last will and testament, the will is that the "share" of the one thus appointing shall "go to and belong to" such surviving child as may be appointed ; and in case a child shall die, leaving issue, he gives the "portion" of the child so dying, not its income merely, to such issue. Thus evincing a design that the issue of his children, when they take, shall take an absolute ownership, and not a mere usufruct ; and by parity of reasoning, that his children, when they take, on the death of a child without issue, shall take as to that portion in absolute ownership also. This conclusion is drawn from what seems to have been the general scope of the will. The particular language used is to the same effect. It is to be "equally divided" among them, and is to "go to and belong to" such as may be appointed, and these are words which easily import an absolute ownership. How could the share of a child dying without issue, be equally divided, if one portion of it was to go for life, and an equal portion go in absolute ownership, to one who might obtain a right to the other portion by survivorship ; or how could it "belong" to one who had only a right to enjoy it for life ? The use of it might indeed belong to such tenant for life, but the share or portion itself, which is expressly mentioned, would in fact belong to some one else, to some remainderman, after the particular estate should cease. In this view of the case, there is no suspension beyond two lives in being, of the power of alienation or of the absolute ownership in the residuum, whether such residuum is regarded in reference to that which necessarily must, or that which possibly may, ultimately flow into it. It is insisted, however, that such suspension springs from that clause in the will which directs the executors from the income of the estate, either real or personal, to appropriate such sums as may

Vail v. Vail.

be necessary for the respectable support and education of the minor children, until each shall marry or attain the age of 21. In *Vail v. Vail*, (4 *Paige*, 328,) the chancellor held that under this clause the executors took the legal estate in the land for a term of years, which would end when the youngest child should arrive at the age of 21 or marry, and that this arises by necessary implication, because, though there be no devise of the land, in terms, to the executors, yet there was, by implication, a devise of the rents and profits during the minority of the children, or while they remained unmarried; and his language would imply that in the same manner the executors would be seised of the absolute ownership of the personal estate, were it not for the statute against accumulations.

I agree with the chancellor, for reasons already stated, in holding that the executors are seised of the legal estate as trustees, for the purposes of the will, and during the continuance of the trust, the estate which they hold is inalienable by them. (1 *R. S.* 730, § 65.) But is the beneficial interest of the *cestui que trust* so? Not unless the trust is for the receipt of the rents and profits of lands. (1 *R. S.* 730, § 63.) Now in *Vail v. Vail*, (4 *Paige*, 328,) the chancellor clearly holds that the trust is for that purpose; not for the purpose of selling merely, for in regard to that it was merely a devise of a power in trust; but for the purpose of receiving the rents and profits of the lands, and holding the surplus, after paying expenses of support and education, as a resulting trust for the heirs, and of receiving the income of the personality in trust for accumulation. The estate is therefore inalienable, either by the trustees or the *cestui que trust*, at least until the youngest child shall attain the age of 21, when the provision for support and education is to cease.

It appears from the pleadings, that at the death of the testator, four of the children were minors, so that this trust would not terminate until the expiration of four minorities. In the *James' will case*, (16 *Wend.* 61,) it was held that the limitation of an estate by the minorities of the persons named, is equivalent to the creation of an estate dependant on the lives of such persons, and that doctrine has been carried out in the later cases

Vail *v.* Vail.

which arose upon the construction of the provisions of our revised statutes as to uses and trusts and future estates. Be that as it may, there can not be, under our revised statutes, any limitation or condition whatever, moderate term of years, average duration of lives, minorities, or any other contingency that may by possibility suspend the ownership beyond the termination of two lives in being. (16 *Wend.* 129.) If the limitation be too remote in its commencement, it is void, and can not be helped by any subsequent event, or by any modification or restriction in the execution of it. It is the possibility at its creation that the event upon which it depends may exceed in point of time the authorized period, which is fatal. (4 *Kent's Com.* 283. 4 *Cruise*, 449. 2 *Burr.* 873.) Now, in this case, the trust may continue until the youngest of the minors shall attain the age of 21, notwithstanding that the other minors may all have died before that period; thus enabling it to endure for a certain period after three lives in being have expired.

It is, however, contended that the trust is a separate one for each minor, and terminates as to each, as each attains the age of 21, or marries, and that as to each share, the limitation is consequently for only one life in being, or only one minority. This argument, however, overlooks two important and controlling considerations. One is, that there is no division or separation of any of the testator's estate, among or in respect to the children, until each shall attain the ages of 21 and 25, and no final partition until the youngest shall attain the age of 25, and that the income out of which the minors are to be supported and educated, is the income of the whole estate, real and personal. It is, however, further contended, that such a trust being illegal, can not be raised by implication: that there being no express devise to the executors of the estate, either real or personal, or of its income, rents and profits, they can become seised of the legal estate or absolute ownership only by implication, which will not be done, when the effect merely is to destroy the very estate which is thus raised up. It is true that the courts will not imply or presume that a testator intended what was unlawful; (3 *Burr.* 1634; *Best on Pres.* 67, § 56;

Vail *v.* Vail.

2 Smith's Lead. Cas. 295;) but this rule is not applicable to the case in hand, for here the implication is that the testator devised the rents and profits to the executors. This was not unlawful, but on the other hand is expressly authorized by statute, (1 R. S. 728, § 55,) and this is the extent of the implication in the case. The statute then steps in and declares what the estate is, which is thus by implication created, namely, that it is a legal estate in him who is entitled to the actual possession, and the receipt of the rents and profits. (1 R. S. 727, § 47.)

It is, however, insisted for the infant defendants that the appropriation for support and education is, at the option of the executors, out of either real or personal estate, and that it might be taken from the latter; in which case no trust would be necessary in either the real or personal estate. The difficulty here, however, is that the court of chancery in *4 Paige*, 328, has already decided under this will that it was the intention of the testator to accumulate the income of his personal estate. For such accumulation a trust was necessary. (*Kane v. Gott*, 24 *Wend.* 663.) So that as to the real estate a trust was necessary to enable the executors to receive and expend the rents and profits, and as to the personal estate, it was necessary to effectuate the intention to accumulate. Such is the effect of the decision of that court on the will in question, and I do not feel myself at liberty to disturb it. Affirming it, as I feel bound to do, the parties may be left to their remedy by appealing from my decision, and thus secure a review of the principle of that of the court of chancery.

There is, however, another view of the case, which appears to me to be quite important and controlling in its influence. It is quite apparent that it was the intention of the testator to have all his estate converted into personal property before its final distribution among his children; for except the provision as to the last payments of \$25,000 to his daughters, in respect to which there may be an investment in real estate, if either of the daughters shall require it, every portion of his estate going to them, either in the first instance, or on the ultimate distribution, is to go to and be received by them as personal property. The

Vail *v.* Vail.

doctrine of equitable conversion will then be applicable to the whole of this will now under consideration, and I am bound to regard the whole of the property in question as personal. (2 *Pow. on Dev.* 60. *Leigh & Dal. on Eq. Con.* 1. *Kane v. Gott*, 24 *Wend.* 660.) The testator had an absolute right to throw it into this shape if he chose, and thus withdraw it from the operation of our statute of trusts. The revised statutes, as to trusts, (1 *R. S.* 627, Art. 2,) have nothing to do with personal property, either directly or by inference. The whole article is confined to lands, or their rents and profits. In regard to personal property, the absolute ownership is not inalienable unless there is a contingent remainder, and the contingency has not yet occurred, and the only restriction of the statute in regard to trusts of personal property is to be found in the sections which forbid the accumulation of the income or profits arising from personal property beyond the cases specified in the statute. (1 *R. S.* 773, §§ 3, 4, 5.)

Now it seems to me, that regarding this estate as personal, there are two difficulties in the way. 1. It is all inalienable, by reason of the contingent remainders. The first takers in all instances take for life only, and the remainders go over either to the issue of the tenant for life, or to the other tenants for life, contingent on the first takers dying with or without issue. To support these remainders a trust is necessarily created in the executors. 2. It has already been held by the court of chancery, in *Vail v. Vail*, (4 *Paige*, 328,) that it was the intention of the will that this trust was also created for the purpose of accumulating the income until the time appointed for the ultimate division among the testator's children, and that such devise for accumulation was void as contravening the statute.

Whatever may be the conclusion as to whether any portion of the estate is inalienable for more than two lives in being at the death of the testator, it has been already decided that one great purpose of the trust, namely, that of accumulation, has failed; and the inquiry remains, whether the trust will be sustained to support the contingent remainders, when its chief and primary purpose has failed. In the earlier cases of *Hawley v.*

Vail *v.* Vail.

James, and *Coster v. Lorillard*, the court went a good ways in overthrowing valid portions of a will when engrafted into a trust which was in some respects void. But in later cases, a different disposition has been shown, and I regard it now as well settled, especially in regard to trusts of personal property, that where personal estate is vested in trustees upon various trusts, some of which are valid, and others void, the courts must sustain those which are legal and valid, if they can be separated from those which are illegal and void. (*Van Vechten v. Van Veghten*, 8 *Paige*, 128.) But the difficulty in this case is to sustain the trust to support the contingent remainders, without carrying along with it the trust for accumulation. It must be borne in mind that the trust in this case has its creation not in any devise of the estate by the will to the executors, but in the implication rendered necessary to sustain the ultimate purposes of the testator. Thus, as an accumulation could not be effected without a trust, a trust was necessarily to be implied, and it would be difficult now to sustain the trust, without carrying along with it the purposes out of which it had its origin. Those purposes have already been declared to be illegal and void, and the trust which had its origin in them, must necessarily fall with them. And the intention of the testator as interpreted by the court of chancery, clearly mingles the illegal accumulations with the residuum in regard to which the contingent remainders are framed ; and if the provision for accumulation could have been effected, it would have been as difficult to separate from the residuum such accumulations, as it would any portion of the principal fund. The two are intimately mingled together in the intention and ultimate disposition, as interpreted by the court, in a decision from which I repeat I do not feel myself at liberty to depart. It seems to me, therefore, that the whole trust, with its purposes, as well of supporting contingent remainders as of accumulating the income, must necessarily fall together, because they can not be separated, and one can not be sustained without carrying the other along with it.

I have already had occasion to remark, that on the principles

Vail v. Vail.

of equitable conversion, the whole estate of the testator is to be regarded as personal property. Although the statute in regard to uses and trusts does not apply to personal property, the statute in regard to future estates in lands does. (1 R. S. 773, § 2.) There is more than one trust in this will. One arising by necessary implication, and so held in *4 Paige*, out of the direction to apply the rents and profits of either real or personal to the support and education of the minor children, and the other expressly created, commencing on the final division of the property among the children. The first trust necessarily expired on the youngest child's attaining the age of 21. And the second would not begin until such child should attain the age of 25, nor then unless the widow should be dead. The second trust, then, is a future estate limited to commence in possession at a future day without the intervention of a precedent estate. (1 R. S. 723, § 10.) And it is contingent because the person to whom it is limited—whether one or more of the children of the testator, or the issue of some such child who may have died—is uncertain. (*Id.* § 13.) Such a contingent future estate is inalienable, because there are no persons in being by whom an absolute fee in possession can be conveyed, and is void in its creation if the power of alienation is suspended for a longer period than two lives in being at the death of the testator. (*Id.* §§ 14, 15. 1 R. S. 773, § 1.)

In regard to some of the bequests, it seems to me that the power of alienation is, or rather may be suspended for an illegal period. Thus, in the five bequests of \$50,000 each, to the daughters, each takes for life only. If either of them should die before attaining the ages of twenty-one or twenty-five, leaving issue, such issue might take for life only; for the provision of the will is, that in case either of the children die, leaving no lawful issue *living at the time the payments are to be made*, the amount is to form part of the residuum, and when it gets into the residuum, it may still be held for life only, for the first taker of the residuum takes for life only, and none of the daughters take of the residuum otherwise than for life, except where they take as contingent remaindermen. The whole of these sums

Vail v. Vail.

then, have been so devised that the power of alienation may be suspended for at least three lives in being, the last life being provided for in the future estate created by the devise of the residuum. Such future estate must, therefore, be regarded as void in its creation. (1 R. S. 723, § 14.) No option is left; for though by section 17 it is declared that where a remainder is limited, on more than two successive estates for life, all the life estates subsequent to the two first shall be void, and the remainder take effect as if no other than the two life estates had been created, yet section 14 declares that the future estate itself shall be void in its creation, and not merely the limitations over. Both these sections must be allowed to operate, and that can only be done by holding that section 17 applies only to present, and not to future estates. The effect of this is not confined merely to that part of the property whose alienation may be illegally suspended—but it is broader, it destroys the future estate itself, and destroys it *in toto*, because it declares it void in its very creation. This principle is not new in our jurisprudence. It is the application of the maxim, that the statute destroys whatever it touches, while the common law, as a nursing father, saves what it can—*valeat quantum valere potest*—and is of frequent occurrence: for instance, in relation to fraudulent conveyances, where not merely is the illegal provision overthrown, but the instrument itself, the conveyance or future estate, or whatever it may be that may be resorted to as the means of effecting an unlawful purpose.

A question yet remains to be considered; and that is how far the decree in the suit of *Vail v. Vail* is a bar to the relief sought in this suit. The point is not raised by the pleadings, but being presented in behalf of the infant defendants who by their guardians *ad litem* have put in a general answer, it can not be overlooked. I have not before me the bill of complaint filed in that suit, and have not therefore any means of ascertaining with certainty the character of the relief therein sought: The report of the case in 4 *Paige* states that the bill was filed to obtain the decision of the court as to the construction of certain parts of the will, and that by it, it was claimed that each of the chil-

Vail *v.* Vail.

dren was entitled to 1-6th of the rents and profits of the real estate and 1-6th of the income of the residue of the personal estate after satisfying certain legacies ; and the chancellor in his decision declares, that the principal if not the only question before him was as to the disposition of such rents, profits and income. He thereupon proceeded to dispose of that question, and in his opinion, as well as in the final decree in that suit, he alluded to and disposed of that question and none other. This is all the means I have of ascertaining the purposes and objects of that suit. There is no doubt of the soundness of the principle contended for, viz. that the judgment or decree of a court possessing competent jurisdiction shall be final, not only as to the subject matter thereby determined, but as to every other matter which the parties might litigate in the cause and which they might have had decided. (*Le Guen v. Gouverneur, 1 John. Cas. 492.*) But a former decree, to be a good bar, must have been between the same parties and for the same subject matter. (*2 Story's Eq. Jur.* § 1523.)

In this case I have no means, as I have already remarked, of determining that the subject matter of the former suit and of this are the same, but on the other hand, so far as I can gather from the papers before me, the subject matter of the former suit, it related only to the rents, profits and income of the estate until the final distribution of the estate itself ; whereas the suit now under consideration relates wholly to such final distribution, and in no respect affects such intermediate income ; and the parties are clearly not the same, for none of the remaindermen, (although some were then *in esse*,) were parties to that suit, while they are all parties to this, and it was not competent for the court in that suit to pronounce upon the rights of such remaindermen, while here it is competent to do so. To allow that suit to be a bar to this would be to give here to the decree in it an authority and binding influence over those who were not parties to it, and were not bound by it, in any other form. It was insisted on the argument, that the contingent remaindermen would be bound by a decree in the suit where the owners of the particular estate were parties, and therefore they were not ne-

Vail v. Vail.

cessary parties. This would be true of the unborn remaindermen, from the necessity of the case, and in such case a decree might bind the persons not in being. (*Story's Eq. Pl.* § 145. *Gifford v. Hart*, 1 Sch. & Lefroy, 408.) But it is not true of remaindermen then *in esse*; and there were such at the time of the former suit who were not made parties. Beyond this, the doctrine of virtual representation to the exclusion of a remainderman from being a party does not extend, except in the single case of the first tenant in tail *in esse*, in whom is vested an estate of inheritance, and who may therefore represent those who may claim in remainder or reversion after such vested estate of inheritance. (*Calv. on Parties*, 48, 52.) The doctrine can not, however, help out the bar which is set up in this case, because there were remaindermen *in esse* who were not made parties to the former suit, and could not be bound by a decree in it.

The result of this examination being that the ultimate disposition in the will is void, and that as to the residuum of his estate, the testator died intestate, a question remains as to the rights of his wife and her second husband, M. Morin.

The second marriage was made in France, where M. Morin was domiciled, and where Madame Morin died, so that his rights in the matter are to be determined by the laws of France. My imperfect knowledge of those laws, and the hazard that I necessarily incur of falling into some error in regard to them, cause me to approach the decision of this point with much diffidence, and to regret that those laws, so far as they affect this question, had not been fully proved before me. As I understand the French law, marriage does not alter the rights of the parties to any property they respectively owned before marriage; the property of each continues his or her own separate property, independent of any control by the other. The rights of the parties may be, and in this case were, defined and regulated by contract between them before marriage. There are two principles, either of which may be adopted in such a contract. 1. *Communauté*, or community of goods. 2. *Régime dotal*, or dotal system. The parties may declare in general terms that

Vail *v.* Vail.

they intend to marry either under the principle of community of goods, or under the dotal system. (*Code Napoleon*, Art. 1391.) The principle of community merges all the personal property of the wife, present and future, and all the income of her real estate, into an eventual community of goods, of which the husband has the entire disposal, without liability to account to any one for the same.

The community embraces 1. All the personal property which the parties owned on the day of the celebration of the marriage, together with all the personal property that may come to them during marriage, by descent, or even by donation, if the donor has not expressed himself to the contrary. 2. All income, interest, and arrears accruing during marriage. 3. All real property acquired during marriage. (*Code Nap.* 1400.) Real property owned by the parties before marriage, or coming to them during its continuance, by descent, does not enter into the community. (*Code Nap.* 1404.)

The dotal system has a different effect, and aims at keeping separate the respective rights of the parties to such property as they owned before marriage, and especially to secure to the wife the exclusive control and enjoyment of her estate, principal and income, unless surrendered to the husband by express stipulation. The parties having agreed to contract marriage under the dotal system, must declare such intention in a specific clause of the contract. A mere declaration that the wife settles upon herself certain property, or that the parties marry without community, is not enough. (*Code Nap.* 1391, 1392.) Besides making the specific declaration, she must constitute her dowry; that is, enumerate the parcels of property of which it is to be composed. (*Code Nap.* 1541.) The dowry is the property which the wife brings to her husband in support of the expenses of the marriage. (*Code Nap.* 1540.) The settlement of the dowry—*constitution de la dot*—may embrace all the present and future property of the wife, or all her present property only, or part of her present and future property, or even an individual article. The settlement, in general terms, of all the wife's property, does not comprehend future property. (*Code Nap.* 1542.)

Vail *v.* Vail.

The husband alone has the management of the property in dowry during the marriage; (*Id.* 1549;) and he or his heirs can be compelled to restore the dowry after the dissolution of the marriage. (*Id.* 1549, 1564.) Hence it would seem that the wife retains in herself the ownership of the principal that is put into dowry, the income only going to the husband during coverture; and also retains to herself the ownership of all property not put into the dowry, and that on her death it goes to her heirs, to whom the husband is bound to restore the principal. All the property of the wife, which has not been constituted dowry, is paraphernal. The husband can not meddle with such property. (*Code Nap.* 1574.) The wife retains the control and enjoyment of her paraphernal property, but she can not alienate it, nor appear in judgment in respect of such property, without the permission of her husband, or if this be refused, without the authorization of the court. (*Code Nap.* 1576.)

Hence it would seem that, without a specific contract, marriage does not, under the French law, abridge or alter the rights of the wife to any property she owned previous to the marriage, or which subsequently falls to her: that a marriage contracted under the principle of *community*, places the parties substantially on the same footing as at common law; that under the *dotal system*, the wife's property remains entirely her own, unless she has specifically in the marriage contract constituted it her dowry, or made it dotal; that where she has constituted no dowry, her property remains paraphernal, or entirely her own, the husband having no farther interest in it than to compel her, out of it, to contribute to household expenses: that to constitute property dotal, it must be specifically mentioned and described, and that what is so mentioned, the husband may enjoy the income of during marriage, but the principal still belongs to, and must be returned to the wife or her heirs, on the dissolution of the marriage, and that her property not constituted dotal, remains paraphernal—that is, her own separate, exclusive property, fee, principal and income, in possession at the time of the marriage, or coming to her afterwards, subject only to its liability to

Vail *v.* Vail.

contribute to household expenses, and restricted as before mentioned in the power of alienation.

Under this law, thus briefly stated, M. Morin and Madame Salles entered into an ante-nuptial contract, in which, by Art. I. they declared that they adopted as the basis of the civil conditions of their marriage, the dotal system, such as it is defined by the provisions of articles 1540, and the following of the civil code of the French, and by Art. IV. the wife sets forth the parcels of property which are to constitute her dowry; viz. the income of one-third of the property belonging to the estate of her late husband, as therein set forth, referring to the decision in the case of *Vail v. Vail*, three mortgages specifically mentioned, valued at 83,500 francs, personal effects and wearing apparel valued at 7000 francs, and divers personal goods, silver plate, and her own jewelry, valued at 13,060 francs. By Art. VI. entitled "Constitution of the Dowry," it is declared that "all the present property of the intended wife, and all such as may come to her hereafter, by descent, donation, legacy or otherwise, is and shall remain dotal to the intended wife." Under these provisions of the marriage contract and the laws of France, I can entertain no doubt that on the death of Madame Morin, all her interest and estate in her first husband's property passed to her heirs, and that her second husband, M. Morin had no right in or title to it.

There are, however, other provisions of the marriage contract and of the French laws which bear on this question, and which may not be overlooked. Persons entering into the marriage contract under the dotal system may establish other property relations between them, without impairing the rights of property secured to each by that system, and that is by forming a co-partnership of acquisitions. (*Société d'Acquêts*; *Code Nap.* 1581.) The object of this association is to regulate and determine the rights of the parties to such property as may be acquired during the marriage from savings and accumulations, whether derived from the income of property made dotal or from earnings or proceeds of their joint industry, thus securing to the wife and her heirs a share in such savings or acquisitions,

Vail *v.* Vail.

whereby the wife, on the death of her husband, or the wife's heirs on her death, may take back not only the principal of that which has been made dotal, but so much of the income thereof as may have been saved during marriage. "In such case after each party has levied and taken back his or her dowry duly constituted, the division of the profits of the *Société*, comprises the acquisitions made by the parties jointly and severally during the marriage, whether arising from the proceeds of their joint industry, or from the savings out of the fruits and income of the property of either." (*Code Nap.* 1498.) The marriage contract between these parties, in its Article II. declared that "Nevertheless there shall be between the said intended husband and wife a *Société d'Acquêts*, the operation of which shall be regulated in conformity with articles 1498 and 1499 of the code, subject to the modifications mentioned in the contract;" and by Article IX. entitled "power of the wife to take back her own," it is declared that "the intended wife or her children shall, on renouncing the *Société d'Acquêts*, have the right to take back all the property belonging to the intended wife which has been designated above, or such as shall legally represent it, together with all the property, personal and real, which may have come to her during the marriage by descent, donation, legacy or otherwise." Article 1499 of the *Code Nap.* enacts that such personal property existing at the time of the marriage, or which may have come to the parties since, as shall not have been identified by inventory or statement in due form, shall be deemed to have been acquired and be considered as acquisition. Now whether the right of Mad. Morin to a distributive share of her first husband's estate, by reason of the failure of the ultimate devise of it, be regarded as dotal under article 6 of the marriage contract, or as acquisition under article 1499 of the code, she, on the death of Morin, and her children on her death, seem to have had the undoubted right reserved by articles 2d and 9th of the marriage contract to take it back as their own property, exempt from any claim of Morin to any thing else than its income during the existence of the marriage.

If any doubt, however, existed as to the rights of M. Morin

Vail *v.* Vail.

under the marriage contract, they seem to me to have been effectually removed by the compromise made between him and the heirs of Mad. Morin in France after her death, and confirmed in due form by the judgment of a competent tribunal. The 10th article of that compromise is as follows: By means of the execution of these presents, and whatever may have been the rights of Mad. Morin to the property existing on the day of the death of her first husband, and whatever may be M. Morin's rights to the property of the society of acquisitions, (*Sur les biens de la Société d'Acquéts*,) M. Morin shall, under no pretext whatever, prefer any claim against the heirs of his wife, which shall have for its object to augment the funds of said society, (*l'Actif de la société*,) nor shall said heirs prefer any claims against M. Morin.

Under this view of the case M. Morin can be regarded as entitled only to so much of the income of his wife's share of her first husband's estate, as had been earned and had not been paid to him at the time of her death, and to nothing more. That may be ascertained on a reference, unless otherwise agreed among the parties.

And as to the residue of this case, it is to be decreed that the specific bequests of \$500 to the French Benevolent Society, of \$250 to the Roman Catholic Orphan Asylum, the bequests to the testator's cousin, Crozes le fils, to his cousin born soubries, the wife of Laquide, to Francis Youett and his children, the bequests of \$10,000 to Mrs. Tonnele, and of \$75,000 to the son, be and stand effectual and valid, and that as to the residue of his property, the testator died intestate, and such residue must be distributed among his next of kin as personal property.

The provision of the will that the testator's children shall share equally in his estate, is untouched by any of the considerations which have been mentioned. His direction is that all of his estate which shall remain shall be allotted and set apart for the use and benefit of his six children and their issue, and in such proportions as to equalize with interest the previous advances which shall have been made by the executors, *saving the \$10,000 given to Mrs. Tonnele, and the \$25,000 devised*

Le Couteulx v. The Supervisors of Erie.

for the use of his wife. In the final distribution, therefore, each of the daughters will be charged with the \$50,000 received by each, and the son with the \$75,000 received by him, with interest, and the residue of the estate be so divided as to make them equal with each other.

The costs of all the parties, with reasonable counsel fees, to be paid out of the residuum before distribution, and for the purposes of distribution there will be a reference to Thomas Addis Emmet, with a reservation of other questions until the coming in of the report.

ALLEGANY GENERAL TERM, September, 1849. *Mullett, Sill, and Marvin*, Justices.

LE COUTEULX vs. THE BOARD OF SUPERVISORS OF ERIE COUNTY.

The act of May 13, 1846, to equalize taxation, is not void as being an *ex post facto* law; it not being designed to operate retrospectively. A lease for a term of thirty years, executed before that act took effect, is within the purview of the act, and the rents therein reserved are liable to taxation; although, at the passage of the act, the lease had less than twenty-one years to run.

A LEASE of land lying in the city of Buffalo was executed by Louis Le Couteulx to Samuel Johnson, by which a term was created, commencing on the first day of May, 1835, to terminate on the first day of May, 1865, and by which an annual rent was reserved, to be paid by Johnson. The plaintiff became the owner of this lease, and entitled to the rents reserved by it, as devisee of the lessor. Under the act of May 13, 1846, (*Sess. Laws*, 466,) entitled "an act to equalize taxation," a tax was imposed upon these rents, and collected of the plaintiff, amounting to \$200 and upwards. The plaintiff brought this suit to recover back the sum so collected. The defendants

Le Couteaux v. The Supervisors of Erie.

put in a demurrer to the complaint, and the cause was referred by consent. The referee reported in favor of the defendants, and the plaintiff moved to set aside his report. The construction and effect of the first section of the act referred to present the only questions argued.

Geo. W. Clinton, for the plaintiff, presented the following points: 1. The act to equalize taxation is void, as an *ex post facto* law. 2. The lease described in the complaint is not a lease for more than twenty-one years, within the meaning of the act, it having less than twenty-one years to run when the act took effect. 3. The act is unjust and oppressive in its operation, and if it will bear two constructions, that should be adopted which will produce the least injustice. Such construction will make it applicable only to leases having more than twenty-one years to run after its passage.

S. G. Haven, for the defendants.

By the Court, SILL, J. The first section of the act of 1846, which is presented for construction, is as follows: "It shall be the duty of the assessors of each town and ward, while engaged in ascertaining the taxable property therein, by diligent inquiry, to ascertain the amount of rents reserved in any leases in fee, or for one or more lives, or for a term of years exceeding twenty-one years, and chargeable upon lands within such town or ward, which rents shall be assessed to the person or persons entitled to receive the same, as personal estate, which it is hereby declared to be for the purpose of taxation under this act, at a principal sum, the interest of which at a legal rate per annum shall produce a sum equal to such annual rent," &c.

Whether the legislature have power to pass a law for the purposes of taxation, which is designed to operate retrospectively, is a question not presented in this case. Such is neither the effect or intent of the statute. It imposes no burden on rents paid or payable before its passage. It looks to the future alone, subjecting to taxation rents reserved in leases of a specified

Le Couteaux v. The Supervisors of Erie.

character, accruing after the act takes effect. The argument presented by the plaintiff's counsel, upon his first point is, that the rent is reserved by a contract made prior to the enactment of the statute, and the imposition of the tax impairs the value of the lease to the plaintiff. It is not easy to perceive how a law, providing for taxation, can be framed, which will not in the outset encounter the same objection. The imposition of a tax for the first time upon land, and the increase of the tax to meet any peculiar exigency, will in the same sense impair the value of the purchase to the owner. Upon the same principle the power of the legislature to tax specific personal property, such as carriages, jewelry, &c. must be denied because it was, when acquired, free from the burden. This objection can not be sustained.

We are also of the opinion that leases which originally created a term exceeding twenty-one years are within the purview of the act, although the term may expire within that number of years after the statute took effect. The assessors are directed to ascertain the rents reserved by "leases for a term of years exceeding twenty-one years," not *rents of unexpired terms exceeding twenty-one years*, nor *rents of leases having yet more than twenty-one years to run*.

This was originally a lease for a term of thirty years, and confessedly belonged to one of the classes specified in the section quoted. Although the term created by it will by reason of lapse of time since its creation expire within a much shorter period, still it is appropriately called a *term for thirty years*, whether we apply the legal definition, or adopt the ordinary acceptation of this language. If the length of the unexpired term were admitted as the test by which to determine what cases are within the act, rents reserved by leases made after the act passed would be exempt from taxation during the last twenty-one years of the terms created by them—a consequence, we think, not in contemplation of the legislature.

It is said, in the third place, that the construction which we are inclined to adopt will be unjust and oppressive upon persons

Le Couteulx v. The Supervisors of Erie.

standing in the situation of the plaintiff, subjecting, as it is claimed, their property to double taxation.

If the statute were really ambiguous it would be our duty to adopt that construction which while it carried out the general design of the legislature would produce the least injustice in its administration. But in the absence of any serious doubt of the true construction of the law, we can not interpose our judgment to save the plaintiff from what he deems injustice in its operation upon him.

The power of taxation in this state, and in every constitutional government, is vested in the legislature. That body must decide upon the necessity or expediency of a tax, the principle upon which it shall be imposed, and the mode of collecting it. The people have a right to expect that their representatives, in the exercise of this high prerogative of sovereignty, will adopt a principle of taxation which will as far as practicable impose a just proportion of the public burden upon all who enjoy the protection of the laws. But if they depart from this principle, in the exercise of their legislative functions, the remedy is not in a court of law. The only security the people have against an abuse of this power, and against unequal and unjust taxation, consists in the interest, wisdom, and integrity of the legislator and his responsibility to his constituents. (4 Peters, 563. 4 Wend. 428. 24 Id. 65.) The report of the referee was right, and there must be judgment on it for the defendants, with costs.

RENSSELAER GENERAL TERM, November, 1849. *Wright, Watson, and Parker, Justices.*

CADWELL vs. COLGATE and others

Where an attachment was issued against a non-resident debtor, on affidavits which were insufficient to confer jurisdiction on the officer issuing it, and after a levy made by the sheriff on the property of the debtor, the latter procured its release by executing and delivering a bond with sureties, reciting the issuing of the attachment, and conditioned as required by statute, for the payment of the debt, with interest, costs, &c. the bond was adjudged to be void.

Where a suit is brought on such bond, by the creditor against the debtor and his sureties, the defendants are not estopped from setting up the invalidity of such bond and availing themselves of the ground that the proceedings under which the property was seized, were void.

DEMURRER. The declaration was on a bond taken under sections 57 and 58, 2 R. S. 3d ed. p. 72. The first count set forth a proceeding in favor of the plaintiff, a resident of this state, against William Woodworth as a non-resident debtor, by attachment issued on the 25th of August, 1846, by Frederick P. Stevens, Esq. first judge of Erie county, counsellor, &c. The substance of the application was set forth in due form, and the further averment that there was attached to said application an affidavit sworn to before said first judge on the day last aforesaid, in which it was set forth that said plaintiff then had a demand against the said Woodworth personally, arising upon contract made in the state of Indiana, amounting to \$100 and upwards, and that the said Woodworth was then indebted to the said plaintiff in the sum of \$2267.22, over and above all discounts, and that the said Woodworth was not then a resident of this state, but that he then resided at Lafayette in the state of Indiana, or elsewhere out of the state of New-York.

And it was further set forth in the declaration that there was annexed to said application another affidavit sworn to on the day last aforesaid, before the said first judge, by John C. Hayward and Solomon Drullard respectively, who were the persons of that name mentioned in the application, in and by which affidavit last mentioned each of said persons last named stated

Cadwell v. Colgate.

and swore that said Woodworth then resided at Lafayette in the state of Indiana, or elsewhere out of the state of New-York, as each of said persons verily believed to be true, and that neither said Hayward nor said Drullard were interested in said application. The declaration further averred the issuing of the warrant of attachment, and that on the same day of the delivery thereof to the sheriff of the county of Erie to be executed, Woodworth applied to said judge for an order to discharge the warrant, and that for the purpose of procuring such discharge the bond sued on was made by the defendants in this suit, and duly acknowledged and delivered to said judge, who approved the same, and thereupon made his order discharging the attachment.

The bond was in the penal sum of \$4415.44, recited the proceedings before the judge, and was subject to a condition to pay Cadwell the amount justly due and owing to him at the time he became an attaching creditor on account of any debt claimed and sworn to by said Cadwell, with interest, costs, &c.

The declaration then averred the indebtedness from Woodworth to Cadwell. To the first count of the declaration the defendant demurred; and the plaintiff joined in demurrer. To the second count there were pleas presenting the same facts as were set forth in the first count, and a demurrer to the plea, and joinder.

A. Taber, for the defendant.

N. Hill, Jr. for the plaintiff.

By the Court, PARKER, J. The defendants contend that an action can not be maintained on the bond given to procure the release of the goods from the attachment, on the ground that the proceedings were void, for the want of a proper affidavit to authorize the issuing of the attachment. The witnesses stated, in their affidavit, that the said Woodworth then resided at Lafayette in the state of Indiana, or elsewhere out of the state of New-York, as each of said persons verily believed to be true,

Cadwell v. Colgate.

&c. This was clearly insufficient to give jurisdiction. The statute requires that *the facts and circumstances* to establish the grounds on which the application is made shall be verified by the affidavit of two disinterested witnesses. (2 R. S. 3d ed. 64, § 5.) Here no fact or circumstance was stated; and it is no proof whatever for a witness to state his *belief* of a fact. A man may be able to swear to his belief, when he has no personal knowledge of the facts necessary to be established. Such testimony is never received in a court of justice. In *Ex parte Haynes*, (18 Wend. 611,) the witnesses stated in their affidavit that they *were informed and believed* that the debtor was a non-resident, and the attachment was set aside for the want of jurisdiction. The case now under consideration is still more defective, as the witnesses do not even state their *information* on the subject. On this point the law is well settled. (*Smith v. Luce*, 14 Wend. 637. *Ex parte Robinson*, 21 Id. 672. *Kingsland v. Corwin*, 5 Hill, 611. *In the matter of Bliss*, 7 Id. 187. *Thatcher v. Powell*, 6 Wheaton, 119. *Williamson v. Doe*, 7 Blackf. 12. *Matter of Faulkner*, 4 Hill, 598.)

But it is said that although the attachment was void, the *bond* is valid. After the issuing of the attachment the party proceeded against applied to the judge for an order to discharge the warrant, which was granted on executing the bond in suit, which was duly acknowledged and approved. Under such circumstances does the bond fall with the other proceedings? The plaintiff contends that the defendants are estopped from denying the issuing of a valid attachment, because it was recited in the bond that an attachment was issued. *Love v. Kidwell*, (4 Blackf. R. 553,) cited by the plaintiff's counsel, was on an attachment bond. The declaration set out the condition of the bond, which after reciting that Kidwell, one of the defendants, had issued a writ of foreign attachment against the plaintiff, stipulated that if Kidwell should prosecute his said writ, &c. against Love to final judgment, and pay all damages that might be sustained by him, provided the proceedings should be wrongful and oppressive, then the bond to be void. One of the pleas interposed was that no writ of attachment ever issued; to which

Cadwell *v.* Colgate.

the plaintiff demurred. The court said "The plea, that no writ of attachment was ever sued out, is bad, because it denies a fact which is admitted to have existed by the condition of the bond, which is set out in the declaration. The plaintiff had a right to avail himself of the estoppel by demurrer. It is not necessary to reply that matter, when it appears by the previous pleading."

In that case, it will be observed, the bond was given by the party suing out the attachment, and he would have no right to question its validity. If it had been void, he would have been liable on the bond for the injury done in suing out void process. There, the bond was for the protection of the person proceeded against. Here, it was given to the attaching creditor, or for his benefit. There it was voluntarily given. Here it was *in invitum*. It would have been no defence to the former bond that a valid writ of attachment had not issued: and the question whether a writ had issued, not going to the validity of the bond itself, the defendant was estopped by the recital. The case cited from Blackford is like that of *Bowne v. Mellor*, (6 *Hill*, 496,) where an action was maintained on an attachment bond given by the party procuring a void attachment. The court said "Bowne, who procured the void attachment, was not at liberty to show the irregularity for the purpose of defending the action."

It is undoubtedly a well settled rule that a party who has executed a deed is thereby estopped from disputing not only the deed itself, but every fact which it recites. (*Trimble v. The State*, 4 *Blackf. Rep.* 437. *Cowen & Hill's Notes*, 1430, 1460. 3 *J. J. Marsh.* 166. 4 *Id.* 655. 7 *Conn. Rep.* 102.) Thus the obligees in an administration bond were held estopped, by the recital in the bond, to deny the appointment of the administrator. (*Cutler v. Dickinson*, 8 *Pick.* 386.) But such is not the effect of a void bond; and if it happens that a fact misstated in the bond is the one which the defendant desires to prove for the purpose of establishing the invalidity of the bond, it can not be that a defendant is remediless. If so, the statute of usury could be evaded, by setting forth in the bond that only seven per cent

Cadwell v. Colgate.

was agreed to be paid. A bond obtained by duress could not be defended against, if it was set forth in the bond that it was voluntarily given. In short, every bond, however illegal the consideration, could be placed beyond the reach of controversy by a simple recital in its condition. This can not be. A mere recital in a bond can not be made to operate, by way of estoppel, so far as to preclude the obligees from showing the instrument void. Avoiding the deed avoids also the estoppel.

Nor do I think the other positions, assumed by the plaintiff's counsel, are tenable. There was no *estoppel in pais*. Woodworth, by giving the bond and applying to discharge the warrant, did nothing to mislead the attaching creditor; nor did the latter take any step affecting his rights in consequence of the giving of the bond. (9 *Bar. & Cress.* 577. 6 *Pick.* 455.) I think also there was no *waiver* of the jurisdictional defect. The judge had no jurisdiction; and Woodworth did no act to confer any. A trespass had been committed, by levying on his property under void process, and he, acting on the defensive, could not procure its release, except by complying with the forms prescribed by law. He therefore executed the bond, and the assumed power of the officer over the property ceased.

In *Homan v. Brinckerhoof*, (1 *Denio*, 184,) a constable, upon an attachment which was void, because no sufficient bond had been given, seized property which was claimed by a stranger who procured the same to be given up, upon executing the bond required in such case; (2 *R. S.* 231, § 33;) and it was held that the plaintiff, being a trespasser in taking the property, could not maintain an action on such bond. There is no distinction in principle between that case and the one now before us. The decision in that case was put on the broad ground that an action could not be maintained on a bond given to obtain the liberation of property illegally taken. If there was an estoppel or a waiver in one case, there was in the other also.

In the *Matter of Faulkner*, (4 *Hill*, 598,) the affidavits on which a foreign attachment issued were insufficient to confer jurisdiction. The debtor applied to the supreme court to set aside the attachment and all subsequent proceedings. It appear-

Cudwell v. Colgate.

ed that trustees had been appointed, and the debtor had previously applied for, and had a hearing in the common pleas, pursuant to 2 R. S. p. 9, § 43. But the court held that these acts constituted no waiver of his right to have the proceedings set aside as void. Bronson, J. said, "This was not a proceeding *in personam*, or an action where a voluntary appearance would be sufficient to confer jurisdiction over the person although not regularly served with process. It was a proceeding *in rem*, and the debtor only came in to save his property. It was not a case where there could be any such thing as a technical appearance. (See *per Parsons, C. J. in Bissell v. Briggs*, 9 Mass. Rep. 469; *Pawlings v. Bird's Ex'r*, 13 John. 192, 207; *Cowen & Hill's Notes*, 908, 1024.) He undertook to prove he was not an absconding or concealed debtor, for the purpose of having the warrant discharged. But I do not see how that could confer jurisdiction on the judge who had previously issued the warrant.

In *Broadhead v. McConnell*, (3 Barb. S. C. Rep. 175,) a defendant was arrested and brought before an officer under the 4th section of the act to abolish imprisonment and to punish fraudulent debtors. The affidavits on which the warrant was issued were insufficient; and the defendant objected to the jurisdiction of the officer, on that ground. That objection being overruled, the defendant proceeded to controvert the facts and circumstances on which the warrant was issued: and, afterwards, to prevent being imprisoned, he gave his bond, with securities, as provided in the 10th section of said act. It was held that he was not estopped from denying the officer's jurisdiction; nor from setting up his want of jurisdiction as a defense to an action on the bond.

The giving of the bond, then, could not have the effect to confer jurisdiction where, as in this case, there was a total want of it. The bond is a part of the attachment proceedings; and must stand or fall with it. The officer having no right or jurisdiction to issue the attachment, it follows, of course, that he had no right to take the bond.

I do not put this decision upon the ground that the bond was

Cadwell *v.* Colgate.

void under 2 revised statutes, page 286, section 59, as being taken *colore officii*. It has been held that that provision applies only to securities executed to the officer, and not to those taken to and for the benefit of the parties suing out the process. (*Ring v. Gibbs*, 26 *Wend.* 510. 3 *Greenl.* 161. 8 *Id.* 426. 5 *Mass. Rep.* 541. *Id.* 314. 7 *Id.* 101.) Though in *The People v. Meighan*, (1 *Hill*, 298,) a bond taken by a justice of the peace in a prosecution for bastardy, and containing in addition to the provisions required by law, others imposing further obligations on the obligor, was declared within the statute, and adjudged void, as being taken *colore officii*.

This bond would be void, independent of any such statutory provision. There being no jurisdiction there was no bond ; the levy was a trespass, and the taking of the bond wholly unauthorized. In *Olds v. The State*, (6 *Blackf. Rep.* 91,) a justice of the peace, without any authority by law, appointed a constable and took his bond with surety for the discharge of his duties. The appointment and bond were adjudged void. So in *Commonwealth v. Jackson's Ex'r*, (1 *Leigh*, 485,) the hustings court of Williamsburgh, without authority of law, for the act, appointed a collector of the public taxes for the city, and took his bond with surety for due collection, &c. The court of appeals held the bond not valid and obligatory as to the surety at least. In neither of these cases were the bonds taken to the officer or court appointing, or for their benefit.

There should be judgment for the defendant on both demurrs, with leave to the plaintiff to amend, on payment of costs.

SAME TERM. *Wright, Harris, and Parker, Justices.*

RUNDELL *vs.* BUTLER.

In an action for slander, actionable words, not declared on, can not be given in evidence.

To render a charge actionable it is not necessary it should be made in direct terms. It may be made in ambiguous language, or by insinuation.

In such a case it is only requisite to aver that the defendant, by means of the words, intimated, and meant to be understood by the hearers, as charging the plaintiff with the crime imputed; and whether such was the intention of the defendant, is a question of fact, to be determined by the jury.

Where the defendant, in speaking of an oath taken by the plaintiff, in a suit before a justice of the peace, and of the defendant's having made a complaint against the plaintiff, before the grand jury for perjury, said "he went to the grand jury and asked them if they wanted any more witnesses, and that they said they had witnesses enough to satisfy them," *Held*, that the words, if laid with the proper averments, were actionable.

THIS was an action for slander, tried before Justice HARRIS, at the Greene circuit in April, 1848. The plaintiff proved that in 1846 a suit was pending before a justice of the peace, in which William McKeon was plaintiff and Hardy Rundell defendant, and that the latter applied for an adjournment and was sworn and examined in support of the application. The plaintiff called several witnesses, who testified that the defendant said, on different occasions, that the plaintiff swore false on that application, and he could prove it. The words proved were the same laid in the declaration. The plaintiff then called James Palmer, who testified as follows: "I know defendant. I have heard of this suit of plaintiff and McKeon. I heard defendant say he went to the grand jury and asked them if they wanted any more witnesses, and that the grand jury told him they had witnesses enough to satisfy them. I think this was the day he came from Catskill." The plaintiff also called Obadiah Caldwell, who testified, "I was in defendant's store after he came back from Catskill. He said he went to the grand jury and they said they had witnesses enough. This was when they went down to get him indicted." Here the counsel for the de-

Rundell v. Butler.

defendant moved to strike out the testimony of this witness, on the ground that the words proved by him were not laid in the declaration. The motion was denied by the court; to which decision the counsel for the defendant excepted. The counsel for the defendant also moved to strike out the testimony of James Palmer, on the same ground, which was also denied, and the counsel for the defendant excepted to the decision. Other questions, not necessary to be stated, were raised on the trial. The jury found a verdict of \$550 for the plaintiff. And the defendant, on a case, moved for a new trial.

M. Sanford, for the plaintiff.

L. Tremain, for the defendant.

By the Court, PARKER, J. There were no such words laid in the declaration as those proved by James Palmer and Obadiah Caldwell. They were no part of any conversation previously proved, nor were they necessary to explain any other evidence. It is now well settled that actionable words, not counted on, can not be given in evidence. (*Keenholts v. Becker*, 3 *Denio*, 346. *Root v. Lowndes*, 6 *Hill*, 518.) It is necessary then, to ascertain whether these words were actionable, or whether they could have been made so when supported by proper averments and proof. It is not necessary that a charge, to be actionable, should be made in direct terms. It may be made in ambiguous language, or by insinuation. (*Gibson v. Williams*, 4 *Wend.* 320. *Andrews v. Woodmansee*, 15 *Id.* 232.) It is only requisite, in such case, to aver that the defendant, by means of the words, insinuated and meant to be understood by the hearers as charging the plaintiff with the crime imputed. And whether such was the intention of the defendant, is a question of fact to be determined by the jury. In *Dorland v. Patterson*, (23 *Wend.* 422,) the words were, "James Dorland gave me the note to give to you, and is it not all one man's hand-writing? I will bet ten dollars that that is a forged note." And when accompanied by the proper averments, on

Rundell v. Butler.

desrurrer they were held actionable. "He has sworn falsely, and I will attend to the grand jury respecting it," without a colloquium showing that the speaking of the words related to proceedings in which perjury could have been committed, were held actionable in *Gilman v. Lowell*, (8 Wend. 573;) because the plaintiff could not have been indicted for false swearing unless perjury had been committed. In *Coons v. Robinson*, (3 Barb. Sup. Court Rep. 625,) "he has sworn to a lie and done it meaningly to cut my throat," was held actionable *per se*, as conveying to the minds of the hearers an imputation of perjury. "I am not a thief," when emphasized with a view to defame, may inflict as serious an injury upon the reputation of the person to whom the words are addressed, as if they had been "you are a thief."

In the case under consideration the witnesses knew the defendant, and had heard of the suit between the plaintiff and McKeon. They knew also that the defendant had been down to Catskill to get the plaintiff indicted. On his return the defendant said "he went to the grand jury and asked them if they wanted any more witnesses, and that they said they had witnesses enough to satisfy them." Was not this in effect saying that there was proof enough to indict the plaintiff? A criminal charge may be as successfully made in such language as by a more direct accusation. If there was any question as to the nature of the offense for which the complaint was made before the grand jury, the doubt could be removed by an averment, and by proof that the defendant was speaking of the oath taken before the justice of the peace. I think the words were actionable, and that this suit would have been no bar to a suit brought for damages for uttering them. To receive them, therefore, as evidence in this suit, might subject the defendant to the payment of damages twice for the same injury. Besides, it was unjust to the defendant to admit the proof of words not laid in the declaration. If they had been counted on, the defendant might have come prepared with rebutting evidence, or to prove some explanation, made at the time of uttering them, that would render them harmless.

King v. Wilcomb.

There was formerly a very wide latitude permitted, at the circuit, in proving slanderous words for the purpose of showing malice. A plaintiff was even allowed to prove charges made after the commencement of the suit. The case of *Root v. Lowndes* goes far towards establishing a safer and more reasonable practice. I see no reason why a plaintiff should ever be permitted to prove a slanderous charge not set forth in his declaration.

The view I have taken of this point renders it unnecessary to examine the other questions raised on the argument. I think there should be a new trial. Costs to abide the event.

New trial granted.

NEW-YORK SPECIAL TERM, October, 1849. *Harris, Justice.*

KING vs. WILCOMB and HOWLAND.

7b 203
d57ad307

The general rule is that any one who has a temporary interest in land, and who makes additions to it, or improvements upon it, with a view to the better use or enjoyment of it, while such temporary interest continues, may, at any time, before his right of enjoyment expires, rightfully remove such additions and improvements. *Per Harris, J.*

If there are any exceptions to this general rule, they are limited, *it seems*, to cases where the removal of the additions or improvements made by the tenant would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession.

In the case of a letting of land for the purpose of nurturing trees and plants, until they are ready to be transplanted, in the absence of any express agreement, the interest of the tenant, in the land, for the purpose contemplated by the parties, will be held to continue until that purpose is accomplished.

Accordingly, where trees, belonging to K. & W., composing a partnership engaged in the nursery business, were planted upon the land of W., one of the partners, by his consent; *held* that the copartnership had a right, as against W., to cultivate the trees until they were prepared for transplanting, and then, from time to time, to remove them, as their business required.

And W. having, after the trees were thus planted, mortgaged the land to H., and

King v. Wilcomb.

It having been sold, under a decree of foreclosure, to H., and neither the mortgagee nor the purchaser being entitled to protection as bona fide purchasers without notice; *Held* that K. might enforce his rights against them, to the same extent as he might have done against W., had the title to the land still remained vested in him.

Held also, that the trees which had been planted by the partnership upon the land of W. still remained liable for the payment of the debts of the partnership, and for any balance found due to K. upon the final adjustment of the partnership accounts.

IN EQUITY. The plaintiff and the defendant Wilcomb, having been engaged in the business of nursery-men with other persons, at Flushing, Long Island, in March, 1838, purchased the interest of their copartners, and commenced the business on their own account, under the firm of Wilcomb & King. They were to be in all respects equal partners. For a time, the business was carried on upon land owned by the partners, as tenants in common. Subsequently, the business requiring more land, a portion of their trees and shrubs were removed to land owned by Wilcomb individually. Some three or four acres of Wilcomb's land was thus used. The occupation commenced, as appears from the testimony, in 1839, and continued until 1845, at which time the partnership had 22,000 trees growing upon Wilcomb's land, worth about \$7000. In January, 1842, Wilcomb mortgaged the land owned by him individually, including that occupied by the firm for the purposes of their nursery, and also his undivided half of the land, with the trees, plants and shrubs thereon, owned by the partnership, to Thomas Bloodgood. The mortgage having been foreclosed, the premises were sold under a decree of foreclosure, on the 28th of May, 1845. At the sale, the plaintiff gave public notice of his claim to one half the nursery planted by the firm upon Wilcomb's land. The defendant Howland became the purchaser of that part of the mortgaged premises owned by Wilcomb individually, and the executor of the mortgagee purchased the undivided half of the premises owned by the partners. The bill in this cause was filed in November, 1845, to close up the affairs of the copartnership, and, besides the usual prayer for a decree against the defendant Wilcomb, as a partner, the plaintiff asked

King *v.* Wilcomb.

for a decree declaring that he is entitled to one half the trees growing in the nursery, upon the premises purchased by the defendant Howland. The defendants put in their joint and several answer, in which the facts were admitted to be substantially as above stated. The defendant Howland claimed that by virtue of the master's deed to him he became entitled absolutely to the land described therein, with the appurtenances, and that the trees, plants and shrubs growing upon the land at the time of the sale, being part and parcel of the freehold, became his absolute property.

It was charged in the bill that there was some trust or agreement between Wilcomb and Howland, by which Wilcomb was to have some interest in the nursery and lands conveyed to Howland, and that the purchase was made in the name of Howland for the purpose of securing to Wilcomb some benefit or advantage. This was denied in the answer, and there was no proof to sustain the charge. The cause was heard upon pleadings and proofs.

W. C. Noyes, for the plaintiff.

M. S. Bidwell, for the defendants.

HARRIS, J. That the plaintiff is entitled to a decree declaring the partnership dissolved, and directing an account to be taken in respect to the affairs of the partnership, is not denied. But as the particular directions to be inserted in the decree may to some extent depend upon the determination of the claim made by the plaintiff to the nursery which the partnership had planted upon the land purchased by the defendant Howland, that branch of the case should first be considered.

There can be no doubt, I think, that as between the partnership and Wilcomb, the trees and shrubs, composing the nursery, are to be regarded as personal chattels. The consent of Wilcomb that the partnership should occupy his land, for the purpose of its business, implies a license to remove the property planted there when the proper period of removal should arrive.

King *v.* Wilcomb.

The relation of landlord and tenant was created by the permission to occupy the land. The ancient rule, that whatever was attached to the freehold by the tenant became a part of the freehold, and could not afterwards be removed by him, has gradually been relaxed in favor of the tenant, until now, I understand the general rule to be, that any one, who has a temporary interest in land, and who makes additions to it or improvements upon it, for the purpose of the better use or enjoyment of it, while such temporary interest continues, may, at any time before his right of enjoyment expires, rightfully remove such additions and improvements. If he omit to sever the addition or improvement until his right of enjoyment ceases, such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement he has made becomes, to all intents, a part of the inheritance, and the tenant, as well as any other person who severs it, becomes a trespasser. I think this may now be stated to be the general rule in respect to fixtures which a tenant attaches to the freehold. To this extent, has the original rule of the common law, *quicquid plantatur solo, solo cedit*, yielded to the changed condition of society. Public policy, especially in this country, requires that the tenant should be permitted so to use the premises he occupies, as to derive from them the greatest amount of profit and comfort, consistent with the rights of the owner of the freehold. There may be exceptions to the general rule I have stated, but I think they will be found limited to cases where the removal of the additions or improvements made by the tenant, would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession. (2 *Ken's Com.* 4th ed. 343. *Van Ness v. Pacard*, 2 *Peters*, 137. *Holmes v. Tremper*, 20 *John.* 29. *Winslow v. Merchants' Ins. Co.* 4 *Met.* 306.)

The only difficulty in applying this rule to the case of a nursery planted by a tenant, is in determining when the right of removal ceases. Usually the temporary interest of the tenant, in the land he occupies, is limited by a term of years, or the termination of some specified life. But in the case of a letting

King *v.* Wilcomb.

for the purpose of nurturing trees and plants until they are ready to be transplanted, I think, in the absence of any express agreement, the interest of the tenant in the land, for the purpose contemplated by the parties, should be held to continue until that purpose is accomplished. (*Miller v. Baker*, 1 *Metc.* 27. *Penton v. Robert*, 2 *East*, 88. *Wyndham v. Way*, 4 *Taunt*. 316. *Grady's Law of Fixtures*, 51 *Law Library*, 80.)

Thus far the case presents but little difficulty. The right of the partnership, as against Wilcomb, to cultivate the trees they had planted, until they were prepared for transplantation, and then, from time to time, to remove them, as their business required, seems to me unquestionable. But another element is brought into the case, which materially increases its difficulty. After the partnership had commenced planting the nursery, as it appears from the evidence, and while the trees were growing in the soil, Wilcomb, the landlord, mortgaged the land to Bloodgood, and the defendant Howland, as purchaser under that mortgage, claims that he is entitled, not only to the land, but to the trees growing there. We are therefore next to ascertain what are the rights of the partnership, as against Howland, in respect to the trees in the nursery.

If no other person but the mortgagor had been interested in the nursery, at the time the mortgage was executed, there can be no doubt, I think, but that the trees would have been held by the mortgage, and, upon the sale, would have become the property of the purchaser, as much as the soil in which they grew. As between vendor and purchaser, or mortgagor and mortgagee, every thing attached to the freehold, or growing in the soil, in the absence of any express provision to the contrary, will pass to the purchaser or mortgagee as a part of the realty. (*Miller v. Plumb*, 6 *Cowen*, 665. *Union Bank v. Emerson*, 15 *Mass.* 152.) We have then in the trees and shrubs, growing in the nursery, a kind of property which, as between the partnership and Wilcomb, is personal property, belonging to the partnership, but as between Wilcomb and his mortgagee is a part of the realty, subject, like the land itself, to the operation of the mortgage. It is the case of a landlord executing a mort-

King v. Wilcomb.

gage or conveyance of land occupied by a tenant, who, for his own temporary use or convenience has attached to the freehold fixtures which he would have a right to remove, but which, if the landlord himself had put them there, he would not be allowed, as against his vendee or mortgagee, to remove. I am by no means certain that the tenant could in any case be deprived of his right of removal, if exercised within his term. But if he could be so deprived at all, it could only be by one presenting himself in the character of a bona fide purchaser, for a valuable consideration, without notice of the tenant's interest. It is admitted that the defendant Howland, when he purchased, had, through his agent who made the purchase for him, actual notice of the plaintiff's claim. If therefore the plaintiff is not entitled to enforce his claim to the nursery, as against Howland, it must be, not because he is himself a purchaser without notice, but because, having notice of the plaintiff's interest in the nursery, he purchased under a mortgage executed under circumstances which entitle the mortgagee to protection as a bona fide incumbrancer without notice. I admit that a mortgagee who has made advances under circumstances which, if he had become the purchaser instead of a mortgagee, would have placed him in the position of a bona fide purchaser for a valuable consideration actually paid without notice of the rights claimed against him, is to be protected as a bona fide purchaser. (*In the matter of Howe*, 1 *Paige*, 125.) It is also true, that a purchaser under such a mortgage, though with notice of the rights claimed against it, is entitled to the same protection as the mortgagee would have been if he had become the purchaser. (*Story's Eq. Jur.* §§ 409, 410, 1503 a. *Varick v. Briggs*, 6 *Paige*, 323.) The reason of the rule is obvious: for if this were not the rule it might, and often would happen, that the bona fide purchaser would lose the benefit of his purchase, through inability to sell. If, then, the mortgagee in this case took his security under such circumstances as would have entitled him, if he had purchased, instead of Howland, to be protected against the plaintiff's claim, as a bona fide purchaser, then Howland is entitled to the same protection.

King v. Wilcomb.

I was at first inclined to think that, inasmuch as the plaintiff had omitted to charge, in his bill, that the mortgagee had notice of his right in the nursery, the case should be determined upon the assumption that the mortgage was taken without such notice. But, upon more reflection, I have come to the conclusion, that the allegations of the bill are sufficient in this respect. The rule, that a plaintiff can only have relief *secundum allegata et probata*, is satisfied when the statements and charges in the bill are such as, if admitted or proved, would warrant the decree sought. Governed by this test, the bill will be found sufficient. If all it states and charges is true, and nothing else is alledged and proved in defense, the plaintiff would be entitled to the relief for which he asks. If Howland would protect his claim to the nursery, upon the ground that he is a purchaser under a mortgage, taken under circumstances which would constitute the mortgagee a bona fide purchaser without notice, it is for him to alledge, either by plea or in his answer, the grounds upon which he relies, and thus tender to the plaintiff an issue upon his defense. The plea or answer must, like the bill, make a case which, if admitted by the omission of the plaintiff to reply, or sustained by the proof, would entitle the party to a decree in his favor. I do not think this answer presents such a case. It admits the execution of the mortgage, as stated in the bill, but it does not state, or claim, that the mortgage was executed as security for any advances made upon the credit of the security; nor does it state, or claim, that the mortgagee, at the time he took the security, was ignorant of the plaintiff's rights in the nursery. In short, it does not present a state of facts which would entitle the mortgagee himself to protection *quasi* a bona fide purchaser. If this be so, it follows that Howland is not entitled to protection in right of the mortgagee. We have already seen that he can not defend his claim to the nursery against the plaintiff by reason of being himself a bona fide purchaser without notice, and as neither the mortgagee nor the purchaser under the mortgage can maintain that character, the result is that the plaintiff may enforce his rights against them, to the same extent as he might have done against

King v. Wilcomb.

Wilcomb, had the title to the land still remained vested in him. It may be added, that there is nothing in the proof that even tends to show, that under any state of pleadings such a defense could be sustained. My opinion therefore is, that while, by virtue of the mortgage executed by Wilcomb, and his purchase under that mortgage, Howland acquired all the interest of Wilcomb in the nursery, the plaintiff was not divested of his interest. The trees and shrubs which had been planted by the partnership upon the land purchased by Howland, still remained liable for the payment of the debts of the partnership and any balance in favor of the plaintiff upon the final adjustment of the partnership accounts.

There must be a decree declaring the rights of the parties upon these principles, and directing the usual account to be taken in relation to the affairs of the partnership, and appointing a referee for that purpose. The decree should also direct that the referee ascertain and report the number and value of the trees and shrubs growing in the nursery at the time the premises came into the possession of the defendant Howland, and also the number and value of the trees and shrubs still remaining there; and if any have been removed since the defendant Howland came into possession, that the referee also ascertain and report the number and value of the trees so removed, and who is justly chargeable therewith, as between the parties to this suit, to the end that upon the coming in of the report, such further decree may be made as shall give effect to the rights of the parties. The decree may also contain a provision for the appointment of a receiver of the partnership effects, with the usual powers, if desired by either party. All further directions, together with the question of costs, are to be reserved until the coming in of the report.

7b 271
80 AD³⁰⁸

O^TSEGO GENERAL TERM, November, 1849. *H. Gray, Mason, and Morehouse, Justices.*

FLEMING vs. HOLLOWBACK and SWEET, ex'rs of Hollenback.

The objection that an interrogatory, annexed to a commission, is leading, may be made upon the trial, when the answer of the witness is proposed to be read in evidence.

If a direct interrogatory, and the answer of the witness to it, are properly excluded by the court, cross interrogatories, and the answers thereto, which are dependent upon the direct interrogatory, should also be excluded.

Depositions taken under a commission can not be received in evidence unless the return of the commissioners is endorsed upon the commission. It is not a compliance with the statute for the commissioners to make their return upon a separate piece of paper, and annex it to the commission or depositions.

A new trial should never be granted on the ground that the verdict is against the weight of evidence, unless the verdict is clearly against evidence.

In general, after a jury has passed upon conflicting evidence, the court will not interfere with their verdict, on the ground of its being against the weight of evidence.

A new trial will not be granted, on account of newly discovered evidence, if the evidence is only material to impeach or contradict witnesses sworn on the former trial; nor where the evidence is merely cumulative.

Nor will it be granted upon the affidavit of a person whose testimony is impeached, by the opposing affidavits; or upon his testimony, taken in connection with the plaintiff's affidavit, showing his materiality.

Neither will a new trial be granted for the purpose of affording a party an opportunity to introduce as a witness, a person thus impeached.

The want of recollection of a fact, which by due attention the party might have remembered, is not a ground for granting a new trial.

THIS was an action of assumpsit, on a lost promissory note, claimed to have been made by John Hollenback, deceased, in August, 1842, for \$3500, payable to the plaintiff. The cause was tried before Justice Allen, at the Tioga circuit, in October, 1848. On the trial of the cause the plaintiff offered to read in evidence the depositions of Robert L. Fleming and Samuel Herrick, taken under a commission directed to James Shaffer of Lemahoning, Clinton county, Pennsylvania. The defendant objected to their introduction, on the ground that there was

Fleming v. Hollenback.

no return indorsed on the commission. The following is the commissioner's return, which was written upon a separate piece of paper, and attached to the back of the answers to the interrogatories, both of which were annexed to the interrogatories to the commission, viz.: "Clinton County, ss. I do hereby certify that in pursuance of a commission issued out of the supreme court of New-York, on the 17th day of March, 1848, and to me directed, to take the deposition of Samuel Herrick and R. L. Fleming, witnesses on the part and behalf of the plaintiff, to be read in court as evidence in a certain cause now pending between John Fleming plaintiff, and George W. Hollenback and Ezra S. Sweet, executors of the last will and testament of John Hollenback, deceased, that in accordance with the said commission hereto annexed, I have examined the said Samuel Herrick and R. L. Fleming, by administering the oath to them publicly and examining them separately and apart on the interrogatories, and reduced the same to writing, this 27th day of March, A. D. 1848, *and have annexed it to the commission*, and do hereby return said rule, &c. to Moses Stevens, clerk of the county of Tioga, Owego, N. Y. as witness my hand and seal this 28th day of March, A. D. 1848.

(Signed) JAMES SHAFFER. [L. s.]²

The court overruled the objection, and the defendants' counsel excepted. The defendants objected to the 4th direct interrogatories put to said witnesses, as leading, and the court sustained the objection and the plaintiff's counsel excepted, on the ground that the defendants could not raise this objection at the trial. The counsel for the plaintiff offered to read in evidence those parts of the depositions contained in the answers to the 4th and 5th cross-interrogatories. The counsel for the defendants objected, upon the ground that these cross-interrogatories were dependent upon the 4th direct interrogatory, which was excluded as leading, and he insisted that these cross-interrogatories being nothing more than a cross-examination of the matter of the 4th direct interrogatory, the answers to these should also be excluded. The court sustained the objection, and the plaintiff's counsel excepted. The jury found a verdict

Fleming *v.* Hollenback.

for the defendants, and the plaintiff moved for a new trial, on the ground that the court erred in excluding the answers to said interrogatories, and on other grounds which sufficiently appear in the opinion of the court.

Davis & Warner, for the plaintiff.

E. S. Sweet, for the defendants.

By the Court, MASON, J. I am entirely satisfied, after a careful examination of the matter, that the court properly excluded the answers of Herrick and Fleming to the 4th interrogatories, on the ground that the interrogatories were leading. The most familiar rule of testing these interrogatories will prove them leading. (1 *Phil. Ev.* 221, 222. 2 *Stark. on Ev.* 123. 1 *Id.* 124. *The People v. Mather*, 4 *Wend.* 247.) And I am of opinion that the party can make this objection upon the trial. The statute contemplates this as the course to be pursued. The officer settling the interrogatories has no power or authority to reject an interrogatory because it is leading. The statute provides that "in settling such interrogatories either party shall be allowed to insert any question pertinent to the cause which he shall propose." (2 *R. S.* 394, § 23.) And the 31st section (*Id.* 396) expressly provides that "every objection to the competency or relevancy of any question put to the witness, or of any answer given by him, may be made in the same manner and with the like effect as if such witness were examined at such trial." And such was the construction given to this statute in the case of *Williams v. Eldridge*, (1 *Hill's Rep.* 249.) It would seem to follow, as a matter of course, that if the direct interrogatory and answer were properly excluded, the fourth and fifth cross-interrogatories, which upon their face appear to be dependent upon it, were also properly excluded; otherwise the provision of the statute reserving the right to object to the competency of the interrogatory and answer, upon the trial, would be of very little avail to the party, inasmuch as he must forego his right to cross-examine the witness, or in effect be de-

Fleming *v.* Hollenback.

prived of the benefit of his objection to the direct interrogatory and answer. The cross-examination will generally elicit much of the matter of the direct examination by way of review and restatement, and consequently the party will lose the whole benefit of his objection to the direct examination if such a construction as the plaintiff's counsel contends for be adopted. I am of opinion, therefore, that these cross-interrogatories were properly excluded; and it follows of course that the answers to them must fall with them. There is, however, another perfect answer to this branch of the case. The defendants' counsel objected to the admission of these depositions for the reason that the statute had not been complied with, in their execution; and I am satisfied that this objection was well taken, and that these depositions should have been excluded. The statute requires "that the commissioners shall annex all the depositions and exhibits to the commission upon which their return shall be indorsed." (2 R. S. 394, § 24, sub. 4.) This, the commissioners have not done in this case. Statutes which innovate upon the common law rules of evidence must be strictly complied with. (*Jackson v. Hobby*, 2 John. 357. *Chappel v. Brockway*, 21 Wend. 157. *Smith v. Randall*, 3 Hill's Rep. 495.) The mode of executing a commission is highly important, and all the safeguards against imposition and fraud which the legislature has imposed must be substantially complied with. It is not the province of the courts to disregard them, or dispense with them, and substitute others in their stead. This doctrine is well enforced and defended in the cases above cited, and was affirmed in its broadest sense, in this court, in the recent case of *Atherton v. Thomas*, in MS., which was a case where the rule allowing the commission to issue contained a command that the same be returned by mail addressed to John B. Moore, clerk of the county of Broome, Binghamton, N. Y., and a copy of this rule was annexed to the commission and returned with it. The commission was otherwise in all respects properly executed and returned, and it was adjudged by this court that the commission and deposition were properly excluded, for the reason that the 23d section of the statute (2 R. S. 394) requires the

Fleming *v.* Hollenback.

officer settling the interrogatories to direct the manner in which the commission shall be returned; and adopting the rule that statutes which innovate upon the common law rules of evidence must be strictly complied with, we held that the court could not waive this want of compliance with the statute, although we might be of opinion that the substitute was equally well calculated to guard against fraud. Applying this principle to the case under consideration, I do not hesitate to say that this commission should have been excluded. The statute requires the commissioners to indorse upon the commission their return. Is it a substantial compliance with the statute for them to make their return upon a distinct and independent paper, and then annex it to the commission or depositions? I do not hesitate to say it is not: and that the sanctioning of such a practice, in making the return, would be but ill calculated to guard against fraud and imposition in the execution of the commission. The fact that such return may be attached or detached from the commission, if made upon a separate and independent piece of paper, is a sufficient reason for not allowing these returns to be made in that way, were there no statute providing for the case. It is sufficient, however, for our purpose, that the legislature, for wise reasons, have required the return to be indorsed upon the commission, and that the courts therefore have no right to depart from the requirements of the statute. For the reasons already stated it is unnecessary to consider the other objections taken to this commission. The commission not having been properly executed, the depositions should have been excluded. Consequently the plaintiff can not complain, even if the court did improperly exclude portions of the evidence contained therein.

The defendants' counsel claims a new trial in this case, for the reason that the verdict is against law and evidence, and against the justness of the claim. I have not been able to discover that the verdict is against law. It may be, perhaps, that it is against the justness of the plaintiff's claim; or, in other words, against the weight of evidence. I have no hesitation, however, in saying that I consider the jury who saw the wit-

Fleming *v.* Hollenback.

nesses and heard them testify, are better judges upon this point than a person who did not hear the trial. A new trial should never be granted for such cause, unless the verdict is clearly against evidence; and in general when the jury have passed upon conflicting evidence the court will not interfere with their verdict on the ground of its being against the weight of evidence. This is the rule distinctly laid down in the case of *Keeler v. The Fireman's Insurance Company of Albany*, (3 *Hill*, 251.) The court lay down the rule in the following language in the case of *Eaton v. Burton*, (2 *Hill*, 578.) "It is the province of jurors and referees to pass upon conflicting evidence, and determine on which side the balance lies; and as a general rule their finding must be regarded as conclusive." There is much conflict of evidence and impeachment of witnesses in this case; and applying this salutary rule to the case, I do not think we should be justified in disturbing the verdict upon this ground.

The next question which I propose to consider is the application for a new trial, on the ground of newly discovered evidence. The testimony of newly discovered witnesses Isaac Bunnell, Augustus Lake, Mary F. Lake and Clinton Cleaveland, is all confined to a contradiction of one of the defendants' witnesses, James Jameson. There are certain principles which the courts have established, and which are to be regarded as settled law, in relation to these applications for new trials on the ground of newly discovered evidence. One is that a new trial will not be granted, on account of newly discovered evidence, which is only material to impeach or contradict witnesses sworn on the former trial. (*Harrington v. Bigelow*, 2 *Denio*, 104. 10 *Wend.* 294. 4 *John.* 425. 5 *Id.* 249. 3 *Id.* 256. *Graham on New Trials*, 496, 502.) This disposes of the application, so far as these four witnesses are concerned. This application is then left to be sustained solely upon the affidavits of the plaintiff and of Horace Howe. Howe is impeached by the opposing affidavits, and I think is shown to be unworthy of credit. A new trial therefore should not be granted upon his testimony alone, or taken in connection with the plaintiff's affidavit showing his materiality. (*Pomeroy v. The Columbian Ins. Co.* 2 *Caines*,

Fleming *v.* Hollenback.

260. *Williams v. Baldwin*, 18 *John.* 489.) The case is then left to stand upon the affidavit of the plaintiff alone ; and he swears to the materiality of two newly discovered witnesses, Nathan Parks and Warren Loomis, the former of whom resides in the state of Ohio, and the latter in the state of Michigan. Loomis is impeached by the opposing affidavits, and is shown to be a standing witness in justices' courts, in his neighborhood. This is, as we have already seen, a good ground for refusing a new trial upon his evidence, or for the purpose of affording the plaintiff an opportunity to introduce him as a witness. In relation to the witness Parks, the plaintiff states what he expects to prove by him. He swears that Parks was present when he, the plaintiff, handed the note in question to Hollenback in his store, and asked him for the pay upon it, and that Hollenback said he could not then pay it, but would pay it in the spring ; that it had stood long enough, and it was time it was paid ; that the amount of the note was spoken of, &c. and when Hollenback handed the note back, Parks took it and read it and then handed it to the plaintiff, and that the note was for \$3500, &c. It is true that the plaintiff has concluded this statement by saying that he did not know that he could prove these facts by Parks, until the 17th day of February last. I think, however, we can not place much reliance upon this latter statement, after he had just sworn positively that Parks was present, and had the note in his hands, and that the plaintiff saw all he swore to. He may perhaps have satisfied his conscience in thus swearing, by the mental reservation that he did not know until the 17th day of February last that Parks would recollect the transaction. The want of recollection of a fact, which by due attention might have been remembered, is not a ground for granting a new trial on such an application. (*Bond v. Cutler*, 7 *Mass. Rep.* 206.) In that case the applicant for a new trial stated that since the former trial it had come to his knowledge that on the day it was alledged that he gave the notes, he was absent in a remote part of the state of Maine. and so he could not have made the note on that day. In reference to this fact the court said, "the defendant can not prevail on this ground ; for he knew where he

Fleming v. Hollenback.

was on the 24th of September, 1801, as well before the trial as after ; and a want of recollection of a fact which by due attention might have been remembered, can not be a reasonable ground for granting a new trial : for a want of recollection may always be pretended, and may be hard to be disproved."

This is the language of the learned Chief Justice Parsons, distinguished alike for his great learning and the clearness and precision with which he stated the principles of the law. This case was adopted as authority in this state by the supreme court, in the case of *The People v. The Superior Court of the City of New- York*, (10 Wend. 285.) And Chief Justice Savage adopts the language of the case in his opinion. (See *Id.* 293.) This is decisive of this application, so far as the testimony of Parks is concerned ; and this rule is not without its force when addressed to the other evidence which it is claimed has been newly discovered. But what appears to my mind most clear and conclusive against granting a new trial in this case, upon this newly discovered evidence, is that it is merely cumulative. (4 John. 425. 5 *Id.* 248. 10 Wend. 292. *Graham on New Trials*, 485, 496. 24 *Pick.* 248.) Cumulative evidence is additional evidence of the same kind. This disposes of all the questions raised by the defendants' counsel on this motion for a new trial ; and the motion must be denied, for the reasons above stated. It may be that the plaintiff in this case has received injustice at the hands of the jury. But while we recognize the settled rules of law which must govern us upon applications of this kind, I do not see how we can afford him any relief. And it may, perhaps, not be improper that I should remark, that the plaintiff's case is not without some strong features of suspicion as to the justice of this large claim.

New trial denied.

SARATOGA GENERAL TERM, November, 1849. *Paige, Willard, and Hand, Justices.*

Moss vs. McCULLOUGH.

In an action against a stockholder in the Rossie Lead Mining Company, to recover a debt contracted by the company, a judgment previously recovered by the plaintiff, against the corporation, upon the same demand, is *prima facie* evidence of a debt against the defendant; but subject to be impeached for collusion, or mistake.

With the exception of cases where fraud or mistake have occurred, a judgment against the corporation, or the liquidation of a debt by the officers of the company, is as obligatory upon the individual stockholders, when they are sought to be charged, as it is upon the corporation itself.

A corporation whose business, according to its charter, was "the raising and smelting lead ore or galena," confined itself for several years after the granting of its charter, to *raising* the ore, the *smelting* being performed for them by M. & K. under a contract. In October, 1839, the directors deeming it for the interest of the company to carry on both branches of the business, themselves, purchased of M. & K. their smelting works for \$15,000, for the payment of which, at a future day, the company gave their promissory notes. In an action against a stockholder upon one of those notes; *Held*, that the directors had authority to make such purchase, and to give the notes of the company for the purchase money; and that such notes were valid and binding.

What is sufficient evidence, to be submitted to the jury, in such an action, as to the authority of the directors to make the purchase, and to give the notes of the corporation for the purchase money.

Evidence of the recovery of other judgments against the company, on notes given by its officers, is admissible as persuasive evidence that the officers had authority to give the notes.

If a portion of the consideration of the note sued on, accrued before the defendant was a stockholder, that portion alone should be deducted from the note, and the plaintiff have a judgment for the balance.

A stockholder in an incorporated company, who is liable for the debts of the company to the amount of the stock held by him, does not stand in the light of a guarantor or surety, but is a principal debtor.

THIS action was commenced by the plaintiff in 1841, against the defendant, as one of the stockholders of the Rossie Lead Mining Company, under the 9th section of the act of May 12, 1837, incorporating said company, (*Laws of 1837*, p. 441,) to recover the amount of a promissory note alledged to have been made by the said company on the 9th of October, 1839, payable to the order of Moss & Knapp, one year after the date thereof,

Moss v. McCullough.

for the sum of \$4050 ; and which note was duly endorsed and transferred to the plaintiff. The declaration was in debt, reciting the statute incorporating the company ; the making of the note by the company ; the recovery of a judgment thereon by the plaintiff, at the January term of this court in 1841, against the company, for \$4142.21 damages and costs ; the issuing of an execution to the sheriff of the county of St. Lawrence, tested the 9th of Feb. 1841, and returnable in sixty days, indorsed to levy the said sum of \$4142.21 and interest from the 8th of Jan. 1841, besides fees and poundage ; and that the said execution was, at the return day thereof, returned by the sheriff wholly unsatisfied. The declaration averred that the note upon which said judgment was obtained was the same identical note now sought to be recovered against the defendants ; and that the defendant, at the time of the making of the said note, was one of the stockholders of the said company. The declaration concluded in the usual form. The defendant pleaded *nil debet* ; and also three special pleas. On demurrer to the special pleas, judgment was given for the plaintiff in May term, 1842, with leave for the defendant to amend. There was also a notice of special matter annexed to the plea. The defendant did not amend. The cause was first tried before Willard, circuit judge, at the St. Lawrence circuit in July, 1842, under the general issue and notice, when the plaintiff obtained a verdict. A bill of exceptions was tendered, to the decision of the judge, which was decided by this court in May term, 1843, and a new trial was awarded. (See *Moss v. McCullough*, 5 *Hill's Rep.* 131.) The cause was tried a second time before the same circuit judge, at the St. Lawrence circuit, in 1843, when the plaintiff again obtained a verdict. The cause again went to this court on bill of exceptions, and in July, 1844, the decision of the circuit judge was concurred in by this court, and a new trial was denied. The cause was then carried, by the defendant below, by writ of error, to the court for the correction of errors ; which court, on the 31st of December, 1846, by a vote of 11 to 8, reversed the judgment of the supreme court, and awarded a *venire de novo*. The cause was tried the third

Moss v. McCullough.

time by Justice Parker, at the St. Lawrence circuit, in August, 1848, when the plaintiff was nonsuited by the learned judge. The cause now came before the court on a bill of exceptions taken by the plaintiff to sundry decisions of the judge at the circuit, and particularly for nonsuiting the plaintiff.

• *J. A. Spencer*, for the plaintiff. I. The evidence in this case showed that the officers of the Rossie Lead Mining Company had authority to make the purchase of property for which the note in question was given, and to execute the note. (*Laws of 1837*, p. 414. *Moss v. Oakley*, 2 *Hill*, 265. 5 *Id.* 131, 137. 7 *Cranch*, 299. *Story on Agency*, §§ 58, 69, 102. *Slee v. Bloom*, 20 *John.* 669. 3 *Hill*, 188. 1 *Denio*, 414. *Corning v. McCullough*, 1 *Comst.* 47.) II. The purchase, even if it be admitted to have been made originally without express authority, was ratified and adopted by the company, by the taking and using of the property for which the notes were given. (See cases above cited.) III. The consideration of the note was entirely lawful, and such as bound the company, and the defendant as one of its stockholders. The property bought was such as was suited to the business of smelting lead ore. This was a legitimate business of the company, as much so as that of mining. (*Laws of 1837*, 441, § 1. *Moss v. Rossie Lead Mining Co.*, 5 *Hill*, 137.) IV. At all events, it was not for the court to determine, as matter of law, whether there was proof of the authority of the officers to make the note; or whether the property bought was such as was suitable for the business of the company. These were questions which should have been submitted to the jury. V. That evidence showed that the note was valid, as against the company; and the individual stockholders could not impeach the validity of the note, except by showing fraud or imposition in obtaining it, or that it was founded in error. (*Slee v. Bloom*, 20 *John.* 669.)

Jesse C. Smith, for the defendant. I. The evidence given by the defendant was competent. (*Moss v. McCullough*, 5 *Hill*, 132; *Bonaffe v. Fowler*, 7 *Paige*, 576.) II. There was

Moss v. McCullough.

no proof of any authority in Averill as president, and Judson as secretary, of the Rossie Lead Mining Company, to make promissory notes. (1 *R. S.* 602, 2d ed. § 6. *Angel & Ames on Corp.* p. 126, c. 7, § 7. *Dickenson v. Valpy*, 10 *B. & C.* 128. *The People v. Utica Ins.* 15 *John.* 383. *White v. Westport Man. Co.* 1 *Pick.* 215.) III. The officers of the company had no authority to make the purchase of the property for which the note was given. The consideration was illegal and not within the corporate powers of the company. (*Angel & Ames on Cor.* 242, new ed. *Wyman v. Hallowell and Augusta Bank*, 14 *Mass. R.* 58. *Salem Bank v. Gloucester Bank*, 17 *id.* 28. *Penn. Co. &c. v. Dandridge*, 8 *Gill & John.* 248. *Hodge v. The City of Buffalo*, 2 *Denio*, 110. See *opinions of Senators Lott and Putnam in court of errors in this case, and the cases cited in those opinions.*) IV. There was no proof of any ratification by the company, or its authorized officers. And if there were any such proof, the company could not ratify or adopt an illegal act. (*Wyman v. Hallowell and Augusta Bank*, 14 *Mass.* 58, 63. *Penn. Co. v. Dandridge*, 8 *Gill & John.* 248. *Livingston v. Lynch*, 4 *John. Ch. R.* 596, 597.) V. There was no dispute about the facts in the case. There was therefore no evidence of the execution of the note by the officers, which should have been submitted to the jury; and the question whether the property for which the note was given was appropriate for the legitimate business of the company, was a question of law for the court to decide. VI. The note in suit was not valid as against the company, and the individual stockholder has all the grounds of defense which the company might have to the suit upon the note, with the addition that he is surety only for the payment of the debts of the company; or is entitled to the benefit of the conditions precedent that the remedy has been exhausted against the company, or that it has been dissolved. (*Moss v. McCullough*, 5 *Hill*, 132; *opinions of Lieut. Gov. and Senator Putnam in this case, in court of errors.*) VII. The proof shows that a part of the consideration of the note arose before the defendant became a stockholder, and therefore the plaintiff can not recover on the note alone,

Moss v. McCulloagh.

without other counts in his declaration. (*Lawler v. Kershaw*, 1 *Moo. & Mal.* 93. *Whitehead v. Baum*, 2 *Moo. & Rob.* 248.) VIII. The case now presented is in no respect varied from the case presented to the court of errors, and decided by that court in December, 1846. The decision of that court reversing the judgment of the supreme court is conclusive and binding upon this court. The defendant is, therefore, entitled to judgment.

By the Court, WILLARD, J. If the questions arising on the last trial, were substantially the same which arose on the trial in 1843, and which were passed upon by the court for the correction of errors, and if the decision of the learned judge, in non-suiting the plaintiff, was the legitimate consequence of the judgment pronounced by the court of *dernier resort*, it would be most becoming in us to deny the motion for a new trial, and to leave the aggrieved party to his remedy in the court of appeals. But if, on the contrary, it shall turn out on examination, either that the learned judge in non-suiting the plaintiff did not properly carry out the views of the court of errors; or if the majority of that court have not agreed upon any principle decisive of the cause, it will be necessary for us to examine the various questions upon principle, and to decide the cause according to our own opinions of the law. It becomes necessary, therefore, briefly to analyze the opinions of the members of the court of errors. Lieutenant Governor Gardiner expressed the opinion, that the circuit judge erred in refusing to submit to the jury the question whether a part of the consideration of the note did not accrue before the defendant became a stockholder; and that for such refusal the judgment should be reversed, and a new trial awarded. He intimates also that the stockholder is a guarantor for the company, and that the action should be brought in the name of the original party to the note, and that this liability was not negotiable. His third objection to the ruling of the circuit judge is substantially like the first, viz. that there was evidence to show that a part of the damages which were included in the note accrued before the defendant became a stockholder. He inclined to the opinion that an en-

Moss v. McCullough.

tire agreement could not be divided. If the judgment of the supreme court was reversed for the first or third reason assigned by the lieutenant governor, Mr. Justice Parker should not have nonsuited the plaintiff, but have submitted the questions of fact to the jury. And if the judgment was reversed for the second reason, it should have been final, and no *venire de novo* should have been awarded.

The opinion of Mr. Senator Lott decides, first, that the plaintiff did not show, on the trial, that the note in question was executed by the authority of the corporation. 2d. That the evidence of its subsequent ratification was not sufficient. 3d. That the note was not obligatory upon the company because it was not given in the legitimate course of their business. They had no right to buy a farm, a school house or threshing machine, &c. And 4th. That the question whether a part of the consideration of the note accrued prior to the defendant's becoming a stockholder should have been submitted to the jury. A reversal of the judgment for the 1st, 2d or 4th reason, would not have concluded the judge trying the cause, unless the testimony was the same as on the former trial. But the testimony on the last trial was much stronger for the plaintiff than on the preceding trial, and should, I think, have carried the cause to the jury on the principles contained in Senator Lott's 1st, 2d and 4th reasons. A reversal for the third reason should have been final; because, if true, it showed that the plaintiff had no cause of action.

Mr. Senator Putnam, in his opinion, repudiates the notion of a guaranty, put forth by the lieutenant governor. He thinks the plaintiff, in the first place, had not shown any authority in the officers of the company to give the note; 2d. That the defendant was not liable, because he was not a stockholder *at the time this suit was commenced*; and 3d. That the consideration of the note was illegal, as it was given in part for property which had no connection with the business of the corporation. If the judgment was reversed for the first objection, there should have been a new trial; and if the testimony as to the authority to give the note was materially strengthened, the cause should

Moss v. McCullough.

have been submitted to the jury. If it was reversed for the two last objections it should have been final.

Mr. Senator Barlow went for an affirmance of the judgment; thus concurring, in substance, with the supreme court. He also expressed the opinion that the judgment against the company finally settled every question as to the validity of the note, and that the defendant could not go back of that judgment and take issue upon the liability of the company; thus concurring with Ch. Justice Spencer in *Slee v. Bloom*, (20 John. 669.) Seven other senators concurred with him.

The fact that a *venire de novo* was awarded affords decisive evidence that a majority of the court did not concur with the lieutenant governor in his second point, nor with Mr. Lott in his third, nor with Mr. Putnam in his last two. We have no means of determining upon which of the other reasons it was reversed. We must presume that it was reversed for a reason which the court thought could or might be obviated on a future trial; or they would not have awarded a *venire de novo*.

From this review of the decision of the court of errors, I am of opinion that this court is not concluded by the reversal of the judgment, but is at liberty to examine and decide the case upon principle.

On the trial of this cause the first time, before Willard, C. J., in 1842, the defendant offered evidence tending to impeach the note, but the judge excluded it, and ruled that the defendant was concluded by the judgment against the corporation. It was for this alledged error that the supreme court granted the first new trial. (*Moss v. McCullough*, 5 *Hill*, 131.) As the same evidence was given on the last trial, before Mr. Justice Parker, with respect to the judgment, that was given on the trial in 1842, the learned judge should not have nonsuited the plaintiff, if the judgment against the company was even *prima facie* evidence of the defendant's liability; much less if it was conclusive upon him. Unless, therefore, we are concluded by the decision of this court, in May 1843, (5 *Hill*, 131,) a new trial should be awarded, if we hold the judgment *prima facie* evidence of debt, against a stockholder; for the same ques-

Moss v. McCullough.

tion arises on the present bill of exceptions that arose on the first. Had that decision of this court been acquiesced in, and followed, for a longer period—had it not been questioned and repudiated by a respectable minority of the court of errors in 1846, and had it not been in direct conflict with the well considered case of *Slee v. Bloom*, (20 John. 669,) in the court of errors, decided in November, 1822, on appeal, I should not have felt at liberty to question it, and much less to depart from it. But as this cause was decided by me on the authority of *Slee v. Bloom*, and as further reflection has confirmed me in the opinion that the judgment against the company is at least *prima facie* evidence of an indebtedness, against an individual stockholder, I shall avail myself of this occasion to state the reasons which have led me to that conclusion.

The 7th section of the act of 1811, relative to corporations for manufacturing purposes, (1 R. L. of 1813, p. 245, 247,) contains these words: "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in the said company, and no further." Under this statute Chancellor Kent held, in *Slee v. Bloom*, (5 John. Ch. Rep. 366, 379,) that a corporation could not be treated as *dissolved* within the meaning of the act, until the forfeiture of its franchise was judicially ascertained and declared. On appeal to the court for the correction of errors, that court, in February, 1821, reversed the decision of the chancellor, upon that, among other points, and held that a corporation might be dissolved by the surrender of all its franchises; that such surrender is an *act in pais*; that by suffering all its estate, real and personal, to be sold on execution, and ceasing to act, the corporation was in fact dissolved, within the meaning of the law, and the persons then composing the company became individually liable for its debts; without first having such dissolution judicially declared by any legal proceeding instituted against the company. The decree of the chancellor being thus reversed, the cause was remitted to the court of chancery, and that court directed a reference to a master to *ascertain*

Moss v. McCullough.

and report the amount due to the complainant, a creditor of the Dutchess Cotton Manufactory, from the said company, and in order to ascertain such amount, it was ordered that the pleadings and proofs be given in evidence, and *such further competent proof as either party might think proper to furnish, &c.* The master made a special report, stating, among other things, that the complainant produced before him the exemplification of a judgment in his favor against the company, and claimed that the same was evidence of his debt against the defendants. And the defendants, on their part, claimed that the liquidation of the account of the complainant against the company, and the giving the judgment therefor, were not conclusive upon them as individuals, but that they were at liberty to contest and falsify the same. The master decided that the judgment was not conclusive upon the defendants, but *prima facie* evidence, only, of the indebtedness, and he allowed the account to be opened and impeached. Both parties excepted to the report, and Chancellor Kent decided, on this branch of the subject, *that the judgment against the company, in its corporate character, was not binding and conclusive upon the defendants, when charged in their private and individual character.* And he also allowed the accounts between the complainant and the company to be opened, notwithstanding the judgment. From this decision an appeal was taken to the court for the correction of errors, and in November, 1822, the decree of the chancellor was reversed. Ch. J. Spencer, who gave the only opinion of the court, says—"I perceive no escape from the conclusion, that the respondents [the individual stock-holders] are individually liable, to the same extent that the company was liable. Whatever was a debt against the company is now, by force of the statute, a debt against them; and if the company itself was concluded, the respondents are equally concluded." And elsewhere he observes, "that the respondents are chargeable with the appellant's debt, on the principle that the trustees, as their agents, have contracted the debt, and because the statute fixes their liability. The respondents can not, therefore, impeach the consideration of the debt, in any other

Moss v. McCullough.

manner, nor on any other ground than any principal can be allowed to impeach a debt contracted by his legally authorized agent." And he proceeds to say that we must regard the judgment as a solemn admission merely on the part of the company, of indebtedness; for it is not of itself, as *res judicata*, binding on the stockholders, if it was procured by fraud, or is founded in error.

The legislature, in 1825, in the sixth section of the act to prevent fraudulent bankruptcies by incorporated companies, &c. (*Laws of 1825*, p. 448,) in effect adopted the views of Ch. J. Spencer, that a corporation may be *dissolved* by an act in *pais*, and they so qualify it, that there must be a neglect to pay its debts, or a suspension of its ordinary business for one year, to work this consequence; and this provision was re-enacted by the revised statutes, title 4, chapter 18, of part 1. (1 R. S. 603, § 4.) The decision of the court of errors in *Slee v. Bloom* was doubtless well known to the legislature, when the act to incorporate the Rossie Lead Mining Company was passed. (*Laws of 1837*, p. 441.) The 9th section of that act does not differ essentially from the similar provision in the act of 1811, relative to corporations for manufacturing purposes. While the latter fixes the liability of the stockholders individually, at the *dissolution* of the company, the former charges it upon those who are stockholders when the *debt or demand is contracted* by the corporation or their agents. The general manufacturing act did not require a judgment first to be recovered against the company, before the individual members should be charged. This is superadded by the 10th section of the act to incorporate the Rossie Lead Mining Company. And the creditor is moreover required to cause an execution to be issued thereon; and his right to sue the individual stockholders is suspended until such execution is returned unsatisfied.

There is nothing, however, in the act which lessens the effect of a judgment against the company, upon the rights of the individual stockholders. If the legislature had intended to repudiate, or to modify, or qualify the decision of the court of errors in *Slee v. Bloom*, with respect to the obligatory force of the judg-

Moss v. McCullough.

ment, it is presumed that they would have used language to indicate that intent. They were not unmindful of that decision; for the 8th section expressly adopts, amongst other things, the part of the revised statutes before cited, relative to the acts which shall be deemed a dissolution of the corporation. The act under consideration is only a part of a great system, commenced at an early day, and intended to secure the credit, &c. of corporations, by superadding the responsibility of the individual members to that of the corporation. A judicial construction of the section under review, by the highest court of the state, after an elaborate argument by eminent counsel, acquiesced in for near a quarter of a century, should not have been disregarded by this court, without the strongest reasons. It is to be presumed that the legislature, in granting the charter to the Rossie Lead Mining Company, intended to adopt the construction which the highest court in the state had thus given to the general law, with respect to which that charter was *in pari materia*. Had they intended to repudiate that construction, they would have adopted terms which would have left their meaning free from uncertainty or doubt. (See 1 *Kent's Com.* 463, *et seq. as to the rules for construing statutes.*)

Were the question an open one, the rule adopted in *Slee v. Bloom* is to be preferred for its convenience and simplicity, and as the most conformable to legal analogies. The officers of an incorporated company are, to a certain extent, the servants of the individual corporators. They owe their election and are amenable to the latter. The ideal person, the corporation, acts through these officers. It can make no contract except by their agency, directly or indirectly exerted. It is true these officers are not the servants of the individual stockholders in matters not connected with the legitimate affairs of the company. But it is insisted, that when the company moves within the sphere which it was designed to occupy, the acts of its officers not only bind the company, but the individual members. It is more just that the latter should suffer by the acts of the officers, than an innocent stranger who has parted with his property in a confiding reliance on their good faith and responsibility. The stat-

Moss *v.* McCullough.

ute fixes the liability upon the stockholders personally for the debts and demands contracted by the corporation or their authorized agent or agents. The stockholders, therefore, can not impeach the consideration of the debt, in any other manner, nor on any other ground, than any principal can be allowed to impeach a debt contracted by his legally authorized agent. He may show collusion between the creditor and the officers of the company, or mistake in liquidating the amount of the indebtedness. But with the exception of fraud or mistake, the judgment against the company, or a liquidation of a debt by the officers of the company, is as obligatory upon the individual stockholders, when they are sought to be charged, as it is upon the corporation itself. The learned judge therefore erred in granting the nonsuit.

But suppose we are wrong in this view of the subject. It will then become necessary to examine some of the other questions that were involved in the case.

It is to be regretted that it does not appear upon what ground the nonsuit was granted. When the plaintiff first rested, the motion for a nonsuit was made on the following grounds. 1st. That the plaintiff had not proved any organization, or acceptance of the charter of the Rossie Lead Mining Company. 2d. That he had not proved any authority to give the note. 3d. That he had not proved any consideration for the note. 4th. That he had not shown that the note was given in the ordinary transaction of the business of the company. 5th. That no special authority had been shown to the president and secretary to give the note, nor had it been ratified by any legal act, subsequently; nor was it shown to have been given for a debt contracted in the ordinary course of the business of the company. 6th. That the defendant is a guarantor for the debts of the company, and the president or other officers had no right to give a note on time. In this stage of the cause the learned judge denied the motion; after which both parties went into evidence, in the course of which it was shown that the note was given on the purchase of the smelting works of Moss and Knapp. And it was conceded, that in the book of minutes of the company,

Moss v. McCullough.

there was no resolution of the directors authorizing the purchase, and the giving of the said note. On the close of the proofs the motion for a nonsuit was renewed on the grounds before stated, and also, 7th. That there was no entry of a resolution on the books of the company authorizing the purchase of the smelting works and the giving of the note. The counsel for the plaintiff insisted, 1. That the officers of the company had authority to make the purchase and to give the note in question, and that the company had ratified and adopted their act; 2. That the consideration was entirely lawful, and such as bound the company, and the defendant as one of its stockholders; 3. That it was, at all events, a question to be submitted to the jury, under proper instructions, whether the said note was properly executed by the officers, and whether the property for which it was given was such as was appropriate for the legitimate business of the company; 4. That the evidence showed that the note was valid against the company, and that the individual stockholders could not impeach it, except by showing fraud or imposition in obtaining it, or that it was founded in error. The judge ordered the plaintiff to be nonsuited, to which he excepted.

The first objection, that no organization of the company was shown, has not been urged. It is founded upon an erroneous assumption of facts, and is without foundation. That a corporation may give a promissory note, is too plain for argument. (*Moss v. Oakley*, 2 *Hill*, 265.) This power in the abstract, has not been questioned by any member of the court of errors. The note imports a consideration, and it is for the defendant to impeach it. The whole of the defendant's objections finally resolve themselves into this: whether the officers of the company were authorized to make the purchase of the smelting works of Moss & Knapp, for which the note in question was given. If they were so authorized, or if the company subsequently ratified the purchase, it is difficult to perceive how the company, or the defendant, can elude the payment of the note in question.

The business of the company, according to the charter, was "the raising and smelting lead ore or galena at Rossie, in St. Lawrence county." The testimony in the cause shows that "the

Moss v. McCullough.

ute fixes the liability upon the stockholders personally for the debts and demands contracted by the corporation or their authorized agent or agents. The stockholders, therefore, can not impeach the consideration of the debt, in any other manner, nor on any other ground, than any principal can be allowed to impeach a debt contracted by his legally authorized agent. He may show collusion between the creditor and the officers of the company, or mistake in liquidating the amount of the indebtedness. But with the exception of fraud or mistake, the judgment against the company, or a liquidation of a debt by the officers of the company, is as obligatory upon the individual stockholders, when they are sought to be charged, as it is upon the corporation itself. The learned judge therefore erred in granting the nonsuit.

But suppose we are wrong in this view of the subject. It will then become necessary to examine some of the other questions that were involved in the case.

It is to be regretted that it does not appear upon what ground the nonsuit was granted. When the plaintiff first rested, the motion for a nonsuit was made on the following grounds. 1st. That the plaintiff had not proved any organization, or acceptance of the charter of the Rossie Lead Mining Company. 2d. That he had not proved any authority to give the note. 3d. That he had not proved any consideration for the note. 4th. That he had not shown that the note was given in the ordinary transaction of the business of the company. 5th. That no special authority had been shown to the president and secretary to give the note, nor had it been ratified by any legal act, subsequently; nor was it shown to have been given for a debt contracted in the ordinary course of the business of the company. 6th. That the defendant is a guarantor for the debts of the company, and the president or other officers had no right to give a note on time. In this stage of the cause the learned judge denied the motion; after which both parties went into evidence, in the course of which it was shown that the note was given on the purchase of the smelting works of Moss and Knapp. And it was conceded, that in the book of minutes of the company,

Moss v. McCullough.

there was no resolution of the directors authorizing the purchase, and the giving of the said note. On the close of the proofs the motion for a nonsuit was renewed on the grounds before stated, and also, 7th. That there was no entry of a resolution on the books of the company authorizing the purchase of the smelting works and the giving of the note. The counsel for the plaintiff insisted, 1. That the officers of the company had authority to make the purchase and to give the note in question, and that the company had ratified and adopted their act; 2. That the consideration was entirely lawful, and such as bound the company, and the defendant as one of its stockholders; 3. That it was, at all events, a question to be submitted to the jury, under proper instructions, whether the said note was properly executed by the officers, and whether the property for which it was given was such as was appropriate for the legitimate business of the company; 4. That the evidence showed that the note was valid against the company, and that the individual stockholders could not impeach it, except by showing fraud or imposition in obtaining it, or that it was founded in error. The judge ordered the plaintiff to be nonsuited, to which he excepted.

The first objection, that no organization of the company was shown, has not been urged. It is founded upon an erroneous assumption of facts, and is without foundation. That a corporation may give a promissory note, is too plain for argument. (*Moss v. Oakley*, 2 *Hill*, 265.) This power in the abstract, has not been questioned by any member of the court of errors. The note imports a consideration, and it is for the defendant to impeach it. The whole of the defendant's objections finally resolve themselves into this: whether the officers of the company were authorized to make the purchase of the smelting works of Moss & Knapp, for which the note in question was given. If they were so authorized, or if the company subsequently ratified the purchase, it is difficult to perceive how the company, or the defendant, can elude the payment of the note in question.

The business of the company, according to the charter, was "the raising and smelting lead ore or galena at Rossie, in St. Lawrence county." The testimony in the cause shows that "the

Moss v. McCullough.

ute fixes the liability upon the stockholders personally for the debts and demands contracted by the corporation or their authorized agent or agents. The stockholders, therefore, can not impeach the consideration of the debt, in any other manner, nor on any other ground, than any principal can be allowed to impeach a debt contracted by his legally authorized agent. He may show collusion between the creditor and the officers of the company, or mistake in liquidating the amount of the indebtedness. But with the exception of fraud or mistake, the judgment against the company, or a liquidation of a debt by the officers of the company, is as obligatory upon the individual stockholders, when they are sought to be charged, as it is upon the corporation itself. The learned judge therefore erred in granting the nonsuit.

But suppose we are wrong in this view of the subject. It will then become necessary to examine some of the other questions that were involved in the case.

It is to be regretted that it does not appear upon what ground the nonsuit was granted. When the plaintiff first rested, the motion for a nonsuit was made on the following grounds. 1st. That the plaintiff had not proved any organization, or acceptance of the charter of the Rossie Lead Mining Company. 2d. That he had not proved any authority to give the note. 3d. That he had not proved any consideration for the note. 4th. That he had not shown that the note was given in the ordinary transaction of the business of the company. 5th. That no special authority had been shown to the president and secretary to give the note, nor had it been ratified by any legal act, subsequently ; nor was it shown to have been given for a debt contracted in the ordinary course of the business of the company. 6th. That the defendant is a guarantor for the debts of the company, and the president or other officers had no right to give a note on time. In this stage of the cause the learned judge denied the motion ; after which both parties went into evidence, in the course of which it was shown that the note was given on the purchase of the smelting works of Moss and Knapp. And it was conceded, that in the book of minutes of the company,

Moss v. McCullough.

there was no resolution of the directors authorizing the purchase, and the giving of the said note. On the close of the proofs the motion for a nonsuit was renewed on the grounds before stated, and also, 7th. That there was no entry of a resolution on the books of the company authorizing the purchase of the smelting works and the giving of the note. The counsel for the plaintiff insisted, 1. That the officers of the company had authority to make the purchase and to give the note in question, and that the company had ratified and adopted their act; 2. That the consideration was entirely lawful, and such as bound the company, and the defendant as one of its stockholders; 3. That it was, at all events, a question to be submitted to the jury, under proper instructions, whether the said note was properly executed by the officers, and whether the property for which it was given was such as was appropriate for the legitimate business of the company; 4. That the evidence showed that the note was valid against the company, and that the individual stockholders could not impeach it, except by showing fraud or imposition in obtaining it, or that it was founded in error. The judge ordered the plaintiff to be nonsuited, to which he excepted.

The first objection, that no organization of the company was shown, has not been urged. It is founded upon an erroneous assumption of facts, and is without foundation. That a corporation may give a promissory note, is too plain for argument. (*Moss v. Oakley*, 2 *Hill*, 265.) This power in the abstract, has not been questioned by any member of the court of errors. The note imports a consideration, and it is for the defendant to impeach it. The whole of the defendant's objections finally resolve themselves into this: whether the officers of the company were authorized to make the purchase of the smelting works of Moss & Knapp, for which the note in question was given. If they were so authorized, or if the company subsequently ratified the purchase, it is difficult to perceive how the company, or the defendant, can elude the payment of the note in question.

The business of the company, according to the charter, was "the raising and smelting lead ore or galena at Rossie, in St. Lawrence county." The testimony in the cause shows that "the

Moss v. McCullough.

raising of lead ore" is one branch of business, and the "smelting" it another. From the granting of the charter to the giving of this note, the company confined themselves to the former branch of business, and the "smelting" was performed for them by Moss & Knapp, under contract. It has not been doubted, that thus far the transactions of the company were legal. Nor has it been questioned that the company might originally have commenced and carried on both branches of the business. In October, 1839, the directors deemed it for the interest of the company to carry on both branches of the business within themselves; and for that purpose they purchased of Moss & Knapp the whole of their smelting works, for the sum of fifteen thousand dollars, for the payment of which at a future day, the company gave certain promissory notes signed by their president and secretary, of which the note in question is one. It is the validity of this purchase which is questioned by the defendant.

Moss v. The Rossie Lead Mining Company, (5 Hill, 137,) was an action brought against the company upon one of their notes, given on the said purchase. The action was defended by the company upon the same grounds which have been taken by the defendant here. It was tried at the Oneida circuit in 1842, before Gridley, circuit judge, who overruled the defence, and directed a verdict for the plaintiff. The cause came before this court on bill of exceptions, to the ruling of the circuit judge, and the motion for a new trial was denied. The opinion of the court, delivered by Judge Cowen, covers the whole ground of the defendant's objections to a recovery in this cause, so far as relates to the authority of the directors to make the purchase, and give the note in question. Ch. J. Nelson concurred in that opinion, and Bronson, J. dissented. That judgment has not been reversed by the court of errors, and still remains in force. As an authority, it is directly in point, and is utterly fatal to the whole defence. I coincide fully with Judge Cowen, in all his reasoning on the subject, and do not therefore deem it necessary to go over the whole again in detail. Every question then discussed has arisen before me, at the circuit, in various other causes, and been invariably decided in the same way.

Moss v. McCullough.

Had the business contemplated by the charter equalled, in its profits, the expectations of the enterprising gentlemen who first embarked in it, there is no question that the defendant would have been entitled to his proportionate share of the gains. The company could not have withheld from him his dividend, on the ground that a threshing machine had been purchased among the implements for smelting lead, and that one of their tenements had been used as a school house, for the children of their hands. Nor could they have withheld it, because no resolution appeared in their book of minutes, directing the purchase, and appointing the president and secretary to execute notes for the purchase money. It would be enough that the property came to their use, and that profits had thereby accrued, to entitle the defendant to his share. Does not the principle of reciprocity require, that since, from various causes without the fault of the parties, the speculation has proved disastrous, the loss should be borne by the same parties who would have shared the gains had the result been as auspicious as their desires?

I think the learned judge erred also in excluding evidence of the recovery of judgments against the company, on notes given by the president. Such judgments afforded persuasive evidence that the company acquiesced in the acts of their officers in giving notes. It matters not that the defendant had then ceased to be a stockholder. Unless it was shown that these judgments were collusively obtained, they afforded competent evidence of the usage of the company with respect to the authority conferred on their officers. It was proper evidence, in connection with other facts, for the consideration of the jury. This evidence was held admissible in *Moss v. The Rossie Lead Mining Co.* (5 Hill, 337.)

The foregoing observations dispose of this case, and show that it should, at least, have been submitted to the jury on the question of authority to make the purchase and give the note. In my judgment the judge should have instructed the jury to find a verdict for the plaintiff.

I may be deemed wanting in respect to the learned members of the court of errors if I should fail to notice the other objec-

Moss v. McCullough.

tions to the plaintiff's recovery. And 1st. It is said that the plaintiff was a guarantor of the debts of the company. This suggestion is made, I believe, for the first time by Judge Cowen, in *Moss v. McCullough*, (*supra*.) Indeed, the learned judge in the same opinion treats the stockholder as a surety for the corporation. A part of the reasoning of Lt. Gov. Gardiner is based upon the hypothesis that the stockholder is a guarantor for the company. On that theory he looks behind the note, into its consideration, and finding that a part of it was composed of damages for a breach of contract, which accrued before the defendant became a stockholder, he holds that the corporation could not increase the responsibility of the guarantor; that the guarantor is only liable for contracts subsequent to the guaranty; and he infers, therefore, that for this reason the note was void as against the defendant. A leading portion of the argument of Senator Putnam is founded on the assumption that the stockholder is the *surety* of the company: and he therefore extends towards him all the indulgent constructions which the law favors with respect to a party bearing that relation. He repudiates the notion of a guaranty as being inapplicable to the case.

Mr. Lott, on the contrary, in his learned opinion, very correctly admits, that the case of the stockholder is not strictly a case of guaranty or suretiship, where laches or indulgence to the creditor would operate as a discharge.

If we look to the statute itself for the evidence of the defendant's liability, rather than to any theoretical reasoning on the subject, we shall find that it does not rest on the principle of guaranty or suretiship. A guaranty, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who in the first instance is liable. (2 *Kent's Com.* 121.) It must be upon a sufficient consideration, moving between the parties, or it will be void by the statute of frauds. It is not negotiable, and is available only in the hands of the party to whom it was given. (*Watson v. McLaren*, 19 *Wend.* 557. *Miller v. Gaston*, 2 *Hill*, 188, 192 *per Bronson, J.*) If the liability of the defendant rests upon the doctrine of commercial

Moss v. McCullough.

guaranty, clearly the lieutenant governor was right in the conclusion which he deduced from it. But this is not a guaranty, but a liability created by statute. It attaches the moment the debt is contracted, and continues until it is paid. It follows the debt into whose hand soever it goes, like the liability of the corporation itself. If the one is negotiable, the other is negotiable also. It has nothing in common with a guaranty, except that a payment of the debt by the corporation discharges the liability. If the stockholder pays the debt he has no remedy over, against the other members of the corporation, for reimbursement. (*Bailey v. Bancker*, 3 *Hill*, 188.) He may, perhaps, in equity, be entitled to contribution, but the remedy is expensive and embarrassed with complicated difficulties. (*See Judson et al. v. The Rossie Galena Co.* 9 *Paige*, 198.) This remedy, if one exists, against the corporation, would be fruitless, because the latter must be shown to have been insolvent, before the remedy of the creditor could be enforced against him.

The condition of a surety differs, in some respects, from that of a guarantor. The claim against him is *strictissimi juris*. He may be discharged even by delay in prosecuting the principal after a request to that effect by the creditor, if the principal thereafter becomes insolvent. (*King v. Baldwin*, 17 *John.* 384.)

But the notion that a stockholder can be deemed either a guarantor or a surety of the company has been expressly disclaimed by this court. (*Harger v. McCullough*, 2 *Denio*, 119.) Both the individual stockholders who were such when the debt was contracted, and the corporation, are principal debtors. And but for the 10th section the creditor might sue either, at his election. The requirement that he shall first proceed against the corporation, is no more than applying an equitable principle, which requires that the debts should be paid from the joint funds of the associates, rather than from the separate property of any one of them. With regard to the debts of the company, the individual stockholders stand upon the same footing as though they were an unincorporated association or partnership. This is the view which was taken of the question under a charter of

Moss v. McCullough.

the same nature, in *Allen v. Sewall*, (2 *Wend.* 327;) and although that judgment was reversed, (6 *Id.* 335,) yet upon this point the members of the court of errors who delivered opinions agreed substantially in the doctrine which had been laid down by this court. This was emphatically so with respect to the chancellor and Senator Tallmadge, who, though they differed on the question of reversal, agreed with the supreme court on the construction of the statute, as to the individual liability of the members. (6 *Wend.* 347, 348, 363.)

Again; it is said that a part of the consideration arose for damages which had accrued before the defendant became a stockholder, and that as the declaration contains only a count upon the note, the plaintiff can not fall back on the residue of the consideration of it, and should for that reason have been nonsuited.

In answer to this, it may be remarked, that it is in the first place by no means certain that any portion of the consideration of the note accrued before the defendant became a member of the corporation. If the cause must turn upon that point, the question of fact should have been submitted to the jury. Secondly. *Prima facie*, the debt was contracted when the note was given. The purchase of the smelting works of Moss & Knapp was the consideration for the note. The defendant was then a stockholder, and the directors in a certain sense his agents. The latter purchased nothing which had not been used in connection with the business of smelting lead. If damages were included in the note, for a breach of contract occurring before the defendant became a stockholder, the defendant was still liable, because the giving of the note was contracting a debt, within the meaning of the charter. Even on the plaintiff's hypothesis, that for those damages he was not liable, he was merely entitled to deduct that amount from the note.

On the whole, I think the nonsuit should be set aside, and a new trial ordered, on the following grounds. 1st. The judgment against the company was *prima facie* evidence of a debt against the defendant, open to be impeached for collusion or mistake. 2d. There was evidence, sufficient to be submitted to the jury,

Griffin v. Martin.

as to the authority of the directors to make the purchase, and to give the note. 3d. The evidence offered, of other judgments against the company, on notes given by the officers, was admissible as persuasive evidence that the officers had authority to give the notes. 4th. If a portion of the consideration of the note and judgment accrued before the defendant was a stockholder, that portion alone should be deducted from the note, and the plaintiff was entitled to a judgment for the balance. 5th. A stockholder does not stand in the light of a guarantor or surety, but is a principal debtor.

New trial granted; costs to abide the event.

SAME TERM. *Before the same Justices.*7 297
86th 480

GRIFFIN vs. MARTIN.

The act of the legislature (1 R. S. 340, 341, § 5, sub. 11) empowering "the electors of each town, at their annual town meeting, to make rules and regulations for ascertaining the sufficiency of all fences in such town; and for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways," is not contrary to the constitution of this state. (Art. 1, § 6, of the Constitution of 1846.) HAND, J., dissented.

The act relative to highways and bridges (1 R. S. 515, § 65) providing for the assessment of damages of the owner of the land through which highways are laid, is to be construed in connection with the act which authorizes the electors of the town to permit cattle, horses and sheep to go at large on the highway.

The damages assessed to the owner, through whose lands a highway has been laid out, since the revised statutes took effect, must be presumed to be coextensive with the use to which such road may by law, be devoted; and, consequently, to cover, not only the easement of a public way, but also, such right of pasture by cattle, horses and sheep, as the said statutes authorize the electors, at their annual town meeting, to permit.

The owner of a close, through whose defective fences, cattle, lawfully in an adjoining close or the highway, have entered, can not maintain an action against the owner of such cattle, for damages. HAND, J., dissented.

The *dicta* in *Jackson v. Hathaway*, (15 John. 483,) *Holladay v. Marsh*, (3 Wend.

Griffin v. Martin.

162,) *Gidney v. Earl*, (12 Id. 98,) *Tonawanda Railroad Co. v. Munger*, (5 *De-
nia*, 255, 264,) and *While v. Scott*, (4 *Barb. S. C. Rep.* 56,) commented on and
explained.

GRiffin sued Martin before a justice of the peace of St. Lawrence county, and on the joining of issue, complained against the defendant, for trespass done by the defendant's cattle, on the plaintiff's close, in the town of Pierpont, on divers days between the first day of June and the middle of October, 1848, and thereby destroying corn, grass and wheat of the plaintiff to his damage of ten dollars. The defendant answered, that if his cattle entered upon the plaintiff's close it was owing to the defect of fences which the plaintiff was bound to keep in repair; and that 2d, the cattle entered, if at all, from the highway, in consequence of the insufficiency of the plaintiff's fences, along the highway, and that by a by-law or resolution of the town of Pierpont, cattle might lawfully run in, and pasture the highway. The plaintiff replied denying the facts stated in the answer. The cause was tried before the justice on the 26th of October, 1848. On the trial, it was proved that within the period specified in the declaration, the defendant's cattle broke and entered the plaintiff's close several times, and did damage to his crops. On some occasions they got over a division fence between the plaintiff and the defendant, which was broken and defective, and which the plaintiff was bound to repair; and on other occasions they entered the plaintiff's close from the highway, through the plaintiff's fence, which was defective, and not over three feet high. The plaintiff's damage was proved to be ten dollars. It was proved on the part of the defendant that a resolution was passed at the town meeting of the town of Pierpont, in 1838, in these words—"Voted that all orderly neat cattle have a right to run at large from the 1st of May to the first of November in each year." And also another in these words—"Voted that all fences shall be equal in strength to a good rail fence four and a half feet high;" both of which resolutions remain unrepealed.

There was some evidence tending to show that the defendant's cattle were unruly, but the fact, that the plaintiff's division fence between him and the defendant, and his fence next

Griffin *v.* Martin.

the highway, were defective and insufficient was not disputed ; and the fact as to the unruliness of the defendant's cattle was abandoned. The defendant moved the justice for a nonsuit, on the ground that the defendant's cattle were rightfully in the highway and in the defendant's lot adjoining the plaintiff's premises, at the several times when they entered the plaintiff's premises, through the defect or want of fence which the plaintiff was bound to make and maintain. The justice granted the motion, and nonsuited the plaintiff. The county court of St. Lawrence county, on an appeal, affirmed that judgment, and the case came before this court on an appeal by the plaintiff.

T. V. Russell, for the appellant.

W. A. Dart, for the respondent.

WILLARD, J. The important question arising on this appeal, and the only one which we understand was discussed in the courts below, is, whether the act of the legislature, empowering the electors of each town, at their annual town meeting, "to make rules and regulations for ascertaining the sufficiency of all fences in such town ; and for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways," is authorized by the constitution of this state. (1 *R. S.* 340, 341, § 5, *sub.* 11.) With respect to the first branch of the foregoing provision, it is not perceived in what respect it is in conflict with the constitution. Regulations for ascertaining the sufficiency of fences clearly fall within that branch of powers which the legislature may with propriety delegate to the towns. It is a branch of internal and domestic police, with respect to which the constitution is silent, and which can be better administered by the people in their primary assemblies, than by any other body. We entertain no doubt of the competency of the legislature to confer this power upon the electors of the several towns in the manner in which it has been granted.

It is the other branch of the section, namely, that which author-

Griffin v. Martin.

izes the electors in town meeting "to determine the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways," which has created the difficulty. The 44th section of the same statute (act concerning the powers, duties and privileges of towns, 1 R. S. 355) enacts, that whenever the electors of any town shall have made any rule or regulation, prescribing what shall be deemed a sufficient fence in such town, any person who shall thereafter neglect to keep a fence according to such rule or regulation, shall be precluded from recovering compensation, in any manner, for damages done by any beast lawfully going at large on the highways, that may enter on any lands of such person, not fenced in conformity to the said rule or regulation, or for entering through any defective fence. This enactment is merely in affirmation of the common law. (*Rust v. Low & Stanwood*, 6 Mass. R. 90.) As regulations existed in the town of Pierpont, antecedent to, and at the time of, the alledged trespasses by the defendant's cattle, prescribing what fences should thereafter be deemed sufficient, and fixing the time within which cattle might go at large on the highway, and as the plaintiff's fences were shown to be insufficient, according to those regulations, it necessarily followed that he could not recover, unless he could show the act in question to be in conflict with the constitution.

The provision of the constitution which it has been insisted is in derogation of the power claimed to be exercised by the legislature, is contained in the 6th section of the 1st article of the present constitution, and is in these words: "Nor shall private property be taken for public use without just compensation." This was taken from the 7th section of the 7th article of the constitution of 1821, and the latter from the 5th article of the amendments of the constitution of the United States. Our legislation on this subject commenced anterior to the adoption of the amendment to the United States' constitution. The 15th section of the act for dividing the counties of this state into towns, passed March 7, 1788, (2 *Greenl.* 170,) authorized "the freeholders and inhabitants of each and every town, at their respective annual town meetings, from time to time, to make, establish,

Griffin *v.* Martin.

constitute and ordain such prudential rules, orders and regulations as the majority of the freeholders, &c. shall judge necessary and convenient for the better improving of their common lands in tillage, pasture, or any other reasonable way ; and for making, maintaining and amending their partition and circular fences for their lands, gardens, orchards and meadows ; and for ascertaining and directing the use and management, and the times and manner of using their common lands and meadows and other commons ; and the times, places, and manner of permitting or preventing cattle, horses, sheep and swine, or any of them, to go at large," &c. "and for ascertaining the sufficiency of all partition and other fences." This section remained in force until 1813, when it was incorporated literally into the act of the 19th of March of that year, entitled an act relative to the duties and privileges of towns. (2 *R. L.* 125, § 12, *p.* 131.) At the revision of the laws in 1830, it was re-enacted in an amended form as proposed by the revisers, omitting "swine" from the class of animals suffered to run at large, and adding to the sentence "on highways." The legislature then, in effect, adopted the construction which the supreme court in *Shepherd v. Hees*, (12 *John.* 433,) and in *Wells v. Howell*, (19 *Id.* 385,) put on upon the words of the former statute, "to go at large." The legislature intended to rescue the statute from the construction which Judge Cowen gave it in his elaborate note to *Bush v. Brainard*, (1 *Cowen*, 78;) and in his valuable Treatise on the civil jurisdiction of justices of the peace, part 1, 383, *et seq.*

The question whether the act under consideration is in conformity to the constitution or not has never been distinctly passed upon by this court, and I am not aware of any case in which it has been necessarily involved. We have *dicta* from highly respectable sources, adverse to the power, but accompanied with no examination of our recent legislation on the subject. Thus, in *Holladay v. Marsh*, (3 *Wend.* 142,) which arose before the revised statutes, Chief Justice Savage intimates a doubt whether it was competent for the legislature to authorize a town to permit domestic animals to depasture the highway. And he observes that the public have simply a right of passage over the

Griffin v. Martin.

highway, and have no right to depasture it. The owner of the land through which the road runs is still the owner of the soil and of the timber, except what is necessary to make and repair bridges; and he asks, if the owner of the soil owns the timber, why not the grass? and he refers to 15 *John.* 453; *Stackpole v. Healey*, (16 *Mass.* 33; 6 *Id.* 99; 16 *Id.* 38.) In *Gidney v. Earl*, (12 *Wend.* 98,) it was held that where a road runs through a man's close, *prima facie*, the fee of the land over which the road passes, belongs to him. The law, says Nelson, J. will not presume a grant of a greater interest or estate than is essential to the enjoyment of the public easement; the rest is parcel of the close." In *The Tonawanda Railroad Co. v. Munger*, (5 *Denio*, 255, 264,) Beardsley, Ch. J. expresses similar views, concluding with the opinion that the legislature "do not possess the power in question, whether compensation be made or not, but certainly in no case unless compensation is made." This opinion was not essential to a decision of the cause before him, as the action was for killing cattle, not on a public highway, but on a railroad where they were confessedly trespassers. In *White v. Scott*, (4 *Barb. Sup. C. Rep.* 56,) McCoun, Justice, took occasion incidentally to remark, when speaking of a town ordinance similar to the one in this case, "that the power of a town meeting can not lawfully be exercised beyond allowing the owners of the soil to turn their own animals out to feed, on such parts of the highway as they respectively own, under such safeguards (rules and regulations) as shall prevent any obstruction of the public use or travel, and as shall, at the same time, avoid collisions and trespasses by the beasts of one owner upon the property of another." And he further intimates, that a town ordinance, like the one in question, is void, as extending beyond the authority which the electors of the town, in their collective capacity, possess under the statute. The learned judge does not consider the act of the legislature unconstitutional, as was urged by Judge Cowen in his Treatise and note, *supra*, but he gives a construction to it, entirely novel, and which defeats the main object and policy of the law. Under his construction, the act does not empower the towns to pass ordinances allowing

Griffin v. Martin.

cattle, sheep and horses to run at large on the highway, but merely to adopt regulations with respect to the *time* and *manner* in which the owner of the freehold may depasture the road which passes through his own close. He views the act as restrictive of the right which might otherwise be enjoyed. He assumes, however, that the act would be unconstitutional, if it allowed the towns to treat the public highways, in any respect, as a common of pasture. Under this narrow construction of the act, none but the great landholders could derive any benefit from it. The poor tenants and other inhabitants, not owners of the soil, would be entirely excluded.

Neither in *Holladay v. Marsh, Gidney v. Earl, White v. Scott*, nor in *The Tonawanda Railroad Co. v. Munger*, was the point we are considering necessarily involved, or in fact decided by the court. In all the cases in which the constitutionality of the act in question has been doubted, the reasons assigned have been, that the soil and grass growing on a highway, belong to the owner of the land, through which the road passes, and that the public have merely a right of passage; and that the effect of the town by-law is to take the private property of the owner of the land, without compensation, for the use of those who permit their cattle to run at large on the highway. This was the ground taken in the cases just cited, and by Judge Cowen in his Treatise, and in the note before cited, and in all the adjudged cases to which we have been referred. (1 Cowen's Tr. 386, n. 1. *Bush v. Brainard*, 1 Cowen's Rep. 78, and note a. *Jackson v. Hathaway*, 15 John. 453, *per Platt, J.* *Cortelyou v. Van Brundt*, 2 Id. 357. 13 Mass. Rep. 258. 16 Id. 33. 12 Wend. 98. 6 East, 154. 3 Hill, 567, 568. 4 Barb. 56. 5 Denio, 264, *per Beardsley, Ch. J.*) Whatever may have been the force of this argument prior to the revised statutes, it is obvious that since the 1st of January, 1830, it is based upon a false assumption. It takes for granted that the owner of the land receives compensation merely for the easement or right of passage. This is not so. The statute which regulates the compensation to be made to the owner through whose lands public highways are laid, does not confine the damages to what

Griffin v. Martin.

arises from parting with a mere right of way. By the 65th section of the act relative to highways, bridges and ferries, (2 R. S. 515,) when the owner of the soil and the commissioners of highways can not agree upon the damages, a jury composed of twelve disinterested freeholders, residing in some other town, are directed to be summoned "*to assess the damages sustained by the laying out of such road.*" These damages will depend on the quantity of interest which is vested in the public. It might be competent for the legislature to take the entire fee of the land; in which case the compensation should be increased accordingly. It is presumed that the public become vested with such interest as the legislature authorize them to use. The existing law, if we consider, as we should, the act relative to towns, and the highway acts, as part of an entire system, empowers the commissioners not only to take the right of passage, but the right of permitting cattle, horses and sheep to go at large on the highway, in such times and manner, as the electors of the town in their annual town meeting shall determine. The damages of the owner of the soil are regulated by what he relinquishes to the public. He thus is compensated not only for parting with the right of way, but for parting with the right of pasturage. Hence the main argument on which the objection to the law rests, is untenable.

It can not with truth be said that a by-law like the one in question, takes the property of one man and gives it to another, or even to the public, without compensation. The owner of the soil is not deprived of the pasturage, any more than he is of the way. He can enjoy both in common with his neighbors. In agricultural districts, and especially in new countries, the public benefit resulting from permitting cattle, horses and sheep to run at large, in highways, probably overbalances the increased expense of acquiring a title to the road. The intrusting the power of regulating the exercise of this right, to the electors of the town, in their annual town meeting, is in conformity to the analogy of our system of government, and will rarely ever lead to abuse. To no other persons could it more safely be confided. No danger is to be apprehended that towns will multiply high-

Griffin v. Martin.

ways for the purpose of acquiring common of pasture. The right of pasturage is a mere incident to the road, and the latter can not, in general, be laid out without the consent of the owner of the soil, over which it passes, except on the certificate upon oath, of twelve reputable freeholders of the town, not interested in the land, nor of kin to the owner, that such road is necessary and proper. It is not to be presumed that those gentlemen will give a false certificate for the sake of an incidental advantage, for which their town must pay an equivalent. (1 *R. S.* 514, §§ 60, 61.) Moreover the public have a guaranty against reckless and improvident applications of this kind, in the equitable and impartial remedy provided for making the assessment of the damages. (*Id.* § 65.)

The cases which have been cited from the English courts, and from those of our sister states, merely show what the common law was upon this subject. They throw no light upon the true interpretation of the revised statutes. Most of our own cases were based upon the former law, and in none of them, was the mind of the court brought to bear on the point we are considering. The supreme court of Massachusetts expressly con-cede, in *Stackpole v. Healy*, (16 *Mass.* 33,) "that the legislature might, if they thought it expedient, provide by law, that for the future, the soil of all highways, that should be laid out, should be vested in the public, and compensate the owner accordingly." And again; they say, that "the pasturage never made any part of the inducement or reason for laying out highways." It has been shown that the statutes of this state since 1830, taken as a whole, subject the soil taken for a highway, not only to the easement of a right of way, but also to the right of pasturage for cattle, horses and sheep, at such times and in such manner as the electors of each town, at their annual town meeting, may prescribe. (*Compare act relative to highways*, 1 *R. S.* 513, §§ 54 to 101, *with the act relative to town meetings*, &c. 1 *R. S.* 340, § 5, sub. 11.) Those statutes, together with the twenty chapters of part 1, were finally passed, as one act, on the 3d of December, 1827, (1 *R. S.* 715, note,) and took effect the former on the 1st of January, 1828, and the latter on the 1st of Janu-

Griffin *v.* Martin.

ary, 1830. (*See 2 R. S. appendix, 777, et seq.*) But, for the purpose of construction, it is expressly enacted, by the 12th section of the act concerning the revised statutes, (*2 Id. 778,*) that all the said statutes shall be deemed to have been passed on the same day, notwithstanding they may have passed, or taken effect, at different times. The right, therefore, to establish highways over the land of an individual, against his consent, and the duty of making compensation therefor, must be considered not only with reference to the easement of a way, but also, with reference to the right of common for such domestic animals as the legislature, at the same time, authorized the electors of the town to permit to run at large on the highways. The presumption, therefore, is that the owner of the soil has been compensated for the easement of a way and the right of pasture, and that the present occupant held the land in subordination to the rights exercised by the electors of the town of Pierpont.

If, then, the regulations of the town of Pierpont with respect to fences, and the running at large upon the highway, of cattle, horses and sheep, are valid, as we have shown they are, the defendant's cattle were lawfully in the highway at the time the pretended trespass was committed; and the plaintiff, through whose defective fences they entered on his premises, can maintain no action for the trespass, and was justly nonsuited by the justice. (*1 R. S. 355, § 44, supra.*) It is settled that one is not bound to fence except against such cattle as are lawfully in the adjoining close or the public highway. (*Rust v. Low & Stanwood, 6 Mass. Rep. 90. Cowen's Tr. part 1, 386, 387. 19 John. 385. 3 Wend. 145.*)

The judgment of the St. Lawrence county court, affirming that of the justice, must be affirmed.

PAIGE, P. J., concurred.

HAND, J. The defendant in this case did not deny the trespass, but put his defence upon the insufficiency of the division fence of the parties, and the plaintiff's fence upon the road.

Griffin v. Martin.

The replication denied these facts, but upon the trial the plaintiff was nonsuited because his fence along the highway was insufficient; and the defendant's attorney swears that the only question upon the motion for a nonsuit, was the constitutionality of the resolution of the town, making rules and regulations for ascertaining the sufficiency of fences, and for determining the times and manner in which cattle, horses and sheep should be permitted to go at large in the highways. The trespass by the defendant's cattle getting into the plaintiff's close from the highway, was clearly proved; and then the defendant proved the two resolutions of the town, that all orderly neat cattle should have a right to run at large from the 1st of May to the 1st of November, and that fences should be equal in strength to a good rail fence four and one half feet high; upon which the plaintiff was nonsuited, because of the insufficiency of the fence. I think this case fairly raises the constitutional question which has been argued in this cause. And upon that point I have no doubt. If the town had the fee of the land and to its own use, that would be another matter. But that is not pretended. And as I understand the law, the public have but a servitude or easement of way over private lands taken for highways. If that be so, the public and individuals have no right to, or power over it, except as a way. If they can depasture it, they can dig up the soil, build upon it, and cut down the trees. If they can take the grass, I see no reason why they may not put it to other uses. And if taking the land for a highway gives to others a right to depasture it, then it is not true that the private property of one can not be taken for the private use of another; and the boasted security to private property in this respect, supposed to be afforded by our laws, is nothing more than a false though beautiful sentiment. Even if a town has power, as a matter of police regulation, to compel the owner to fence along the highway and keep his own cattle off certain portions of the year, that confers no authority to give a license to other persons to appropriate the productions of the soil to their own use.

But the authorities are full upon this point. "The former proprietor," says Platt, J., "still retains his exclusive right in all

Griffin v. Martin.

mines, quarries, springs of water, timber and earth, for every purpose not inconsistent with the public right of way." *Jackson v. Hathaway*, 15 John. 447.) "In an highway the king shall have nothing but the passage for himself and his people." (4 *Vin.* 515.) "The freehold and all the profits belong to the owners of the adjoining lands." (3 *Kent*, 433, and *cases there cited*.) "The freehold and all the profits, as trees, &c. belong to the lord of the soil or to the owner of the lands on both sides the way." (3 *Bac.* 394.) "The public have simply a right of passage over the highway; they have no right to depasture the highway." (*Savage, C. J.* 3 *Wend.* 147.) This doctrine has been repeated again and again, not only in England and this state, but probably in every state in the Union. (*Cortelyou v. Van Brundt*, 3 John. 363. *Livingston v. Mayor of N. York*, 8 *Wend.* 107. *Gidney v. Earl*, 12 *Id.* 98. *Willoughby v. Jencks*, 20 *Id.* 97. *Barclay v. Howell's Lessee*, 6 *Pet.* 513. *Harris v. Elliot*, 10 *Id.* 25. *Adams v. Emerson*, 6 *Pick.* 57. *Perley v. Chandler*, 6 *Mass.* 454. *Chatham v. Brainard*, 11 *Conn. Rep.* 60. *Headlam v. Hedley*, 1 *Holt's Rep.* 465. *Grose v. West*, 7 *Taunt.* 39. *Goodtillé v. Alker*, *Burr.* 133. And see *Dovaston v. Payne*, 2 *Smith's Lead. Cas. Am. ed.* and the *cases there cited*.)

This being so, neither the town nor the state has power to give a right to individuals to use the land, only as a highway. All except this right of use by the public, remains in the owner, and can not be taken from him for private use, without his consent, or due process of law. (2 *Kent*, 340. *Taylor v. Porter*, 4 *Hill*, 140. *Stackpole v. Healy*, 16 *Mass.* 33. *Wilkinson v. Leland*, 2 *Pet.* 627, 655. *Holladay v. Marsh*, 3 *Wend.* 147. *Wells v. Howell*, 19 *John.* 385. 1 *Cowen's Rep.* 87, note a.) Depasturing land is no part of its use as a highway; and if the true construction of the statute is, that towns may license owners of cattle to turn them at large on to the highways for the purposes of grazing, I have no doubt it is so far unconstitutional and void. (*Const. art. 1, § 6.* 1 *R. S.* 341, § 9.)

Judgment affirmed.

R. 1

7b 309
40 Mis^o 14SAME TERM. *Before the same Justices.*WILLIAMS *vs.* SAFFORD.

The grantee of a *private* way, which has become foundrious and impassable, can not, without being a trespasser, go on the adjoining close, and thus pass around the obstruction.

The rule is the same, where the owner of the close through which the *private* way passes, caused the obstruction.

It *seems* that the only remedy for the owner of the way is to remove the obstruction and to prosecute for damages.

There is no distinction, with respect to the right of passing *extra viam*, between a *private* way by grant and a *private* way *ex necessitate*, after the latter has once been selected or assigned.

The same rule applies to a *private* way by *prescription*, that controls in the case of a *grant*.

A person travelling on a *public* highway, which has become foundrious and impassable, has a right to remove enough of the fences in the adjoining close, to enable him to pass around the obstruction, doing no unnecessary injury; but he becomes a trespasser if he tears away other fences, and tramples down the herbage in other parts of the close.

DEMURRER. The action was trespass *quare clausum fregit* upon lot No. 68 in the town of Salem. The defendant pleaded several special pleas, and the plaintiff replied specially, and by new assignments. The plaintiff demurred to the 6th, 7th, 8th, 10th and 11th pleas to the new assignments, and the defendant joined in demurrer. The several pleadings, and the questions of law raised by them, are fully set forth in the opinion of the court.

C. L. Allen, for the plaintiff.

James Gibson, for the defendant.

By the Court, WILLARD, J. The demurrer to the sixth plea of the defendant to the several replications and new assignments of the plaintiff, to the 2d, 5th, 6th, 7th, 13th, 14th and 15th pleas in bar, raises the question whether the grantee

Williams v. Safford.

of a private way, which is obstructed by the grantor so that the grantee can not pass, may go out of the way upon the grantor's land, to avoid said obstruction, doing no unnecessary damage.

The cases relied on by the defendant's counsel are not analogous to this, but are clearly distinguishable. The owner has a right to retake his goods, on the freehold of the trespasser by whom they were wrongfully taken, provided he can do it without a breach of the peace. (*Scribner v. Beach*, 4 *Denio*, 449, 451.) And a man may justify a trespass in entering his neighbor's land and peaceably abating a nuisance. The defendant in this case had a right to remove the obstructions from the road, and he had a cause of action against the plaintiff for placing them there. (*Fowler v. Lansing*, 9 *John.* 349.) These are all the remedies which the law allows him, and they are abundantly adequate.

There are some cases which give countenance to the opinion that the owner of a private way, when it is out of repair, may go on to the adjoining ground, in like manner as it is conceded it may be done, when a public road has become foundrious and impassable. This opinion was intimated by Blackstone in his commentaries, (edition of 1765,) and by Ch. Baron Comyn, in his digest, (Chemin D. 6.) But the authorities cited in support of the opinion do not warrant it; for they all seem to relate to *public ways* only. (1 *Saund.* 322 *a*, *n.* 3.) The rule was unquestionably held otherwise in *Taylor v. Whitehead*, (*Doug.* 744,) with respect to private ways, rendered impassable by the overflow of a river; and the same principle was again asserted in *Bullard v. Harrison*, (4 *Mau. & Sel.* 387, 392.) Lord Ellenborough remarks that the plaintiff has no right to break out of the road and go at random over the whole surface of the close. The same principle is recognized by this court in *Holmes v. Seeley*, (19 *Wend.* 507.)

The fact that the plaintiff caused the obstruction to the road can no more justify the defendant in going *extra viam*, than a private nuisance, erected by the landlord, prejudicial to the enjoyment by his tenant of demised premises, can justify the entry of the latter on other premises of the same landlord. The

Williams v. Safford.

law gives no remedy in such case but to abate the nuisance, or an action for damages. The grantee of a private way is himself bound to keep it in repair. He alone has the right of using it. He alone can prosecute for an obstruction of it. Highways are governed by a different principle. They are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line. (*Doug. 748, per Lord Mansfield.*) The obstructing of a public highway may be punished by indictment. It may also be abated by any person as a nuisance, and the individual sustaining a particular injury, not common to all, may sustain an action against the party occasioning the obstruction. This demurrer therefore is well taken.

The demurrer to the 7th plea in bar to the replication and new assignment of the plaintiff to the 11th plea, presents the question whether the owner of a private way, originating *ex necessitate*, which has become foundrious and impassable, can pass out of the way on to the plaintiff's close adjacent thereto to avoid such obstructions. The general doctrine is not denied, that when one grants land to another to which there is no access except over the soil of the grantor, there is a right of way as incident to the grant; on the principle that the grant shall be taken most strongly against the grantor, and because such right is necessary to the enjoyment of the thing granted, and without which it would be of no avail. This is called a right of way *of necessity*.

In *Taylor v. Whitehead, supra*, Buller, justice, observes that if the way pleaded in that case had been a *way of necessity*, the question, whether in case it became foundrious the owner might go *extra viam*, would have required consideration; but it was not so pleaded. This dictum has given rise to the intimation in Woolrych on Ways, 51, and of Ch. J. Nelson in *Holmes v. Seeley*, (19 Wend. 510,) that "there is a distinction between a *private way by grant* and one of *necessity*, resting upon the ground that the one is the grant of a *specific track* over the close, while the other is a general right of way over it; the one an express specific grant, the other a more general implied one." It is believed, however, that there is no such dis-

Williams *v.* Safford.

tinction between them. A private way of necessity is nothing else but a way by grant. (1 *Saund.* 323 *a*, *n.* 6. *Bullard v. Harrison*, 4 *M. & Sel.* 393.) Such way does not give the owner a right to go at random over the entire close. He has a right merely to a convenient way, due regard being had to the convenience of both parties. Nelson, Ch. J. in *Holmes v. Seeley*, intimates "that the grantor should be allowed to assign such way as he could best spare. If he decline or omit, the grantee must select for himself, and the court would no doubt extend a liberal indulgence to the exercise of his discretion." But after the way has once been assigned, or selected, it rests on the same footing as any other way by grant, and both parties are bound by it; the grantor not to obstruct it, and the grantee to be confined to it.

The defendant in this case has not pleaded this way of necessity in general terms, but has set out the grant and specified the manner in which the plaintiff's close became charged with the road. He does not claim a right, in his plea, to go at random over any part of the plaintiff's land. He has followed the approved mode of pleading recommended by Sergeant Williams in note 6 to 1 *Saund.* 323. I think the plaintiff is entitled to judgment on this demurrer.

The demurrer to the 8th plea in bar to the replication and new assignment to the 11th plea in bar raises the question whether the owner of a private way, originating *ex necessitate*, and which has been obstructed *by the plaintiff*, can pass out of the way on to the plaintiff's close adjacent thereto, to avoid such obstructions. This presents the same question as the last plea, except that in this, the obstruction is alledged to have been placed in the road by the plaintiff, and in the last, it is not stated by what means the road became impassable. The principle decided in discussing the demurrer to the 6th plea disposes of this also. It makes no difference whether the road was obstructed by the plaintiff, or a stranger, or by the act of God. In neither case can the defendant justify a trespass *extra viam*. (a) Judgment for plaintiff on this demurrer.

(a) See *Boyce v. Brown*, (*ante*, p. 80.)

Williams v. Safford.

The demurrer to the 10th plea in bar, to the replication and new assignment to the 4th and 10th pleas in bar, presents the same question, as in the last demurrer. The only difference is, that in the 4th and 10th pleas the defendant sets up a way by *prescription*. But the same doctrine applies with respect to a private road by *prescription*, that governs in the case of *grants*. (See 1 *Saund.* 323, n. 6.) The plaintiff must therefore have judgment on this demurrer.

The demurrer to the 11th plea in bar to the replication and new assignment to the 3d plea in bar is well taken. The 3d plea alledges that the close in which, &c. was a public highway, and that fences were wrongfully erected, and the defendant removed them. The replication and new assignment denies that it was a public highway, and tenders an issue to the country. It then new assigns that the action was brought not only for the trespasses in the third plea mentioned and therein attempted to be justified, but also for that the defendant on the said several days, &c. with force and arms, &c. with greater force than was necessary for abating the obstruction in that plea mentioned, and opening the said road, committed the trespasses in that plea mentioned; and also, for that the defendant, on &c. with force and arms, &c. broke and entered the said closes of the plaintiff with his hands, cattle, &c. and trod down the grass, &c. and for other and different purposes than those mentioned in the plea, and tore down and removed the fences of the plaintiff, of great value, to wit, for other and different purposes and on other occasions, &c. alledging that there were other and different trespasses than those mentioned in the third plea.

The 11th plea is, not guilty to the whole replication, and then as to the residue of the said supposed trespasses, that the way was foundrious and impassable, so that the defendant could not pass, &c. wherefore he necessarily did pass a little out of said road on said closes of the plaintiff, adjacent to said way, in order to avoid such obstruction, doing no unnecessary damage.

This plea is no answer to the new assignment. Assuming that the defendant had a right to turn out from an impassable public highway, on to the plaintiff's close, he still had no right

Culver v. Haslam.

to remove the plaintiff's fences from other parts of his lot, and do the damage of which the plaintiff complains, and which damage was other and different from that connected with removing the obstructions from the road. A person travelling on a public highway, and finding a place foundrious and impassable, has doubtless a right to remove enough of the fences in the adjoining close to enable him to pass around the obstruction, doing no unnecessary injury. But he has no right, after entering the close, to tear away other fences, or to trample down the herbage in other parts of the close. The plea is therefore bad, and there must be judgment for the plaintiff, with leave for the defendant to amend, on payment of costs.

Judgment for the plaintiff on all the demurrs, with leave for the defendant to amend on payment of costs.

SAME TERM. *Before the same Justices.*

CULVER vs. HASLAM.

Sca. 12. 1849. 550 - 4 Sc. 4 October

On a question as to the mental capacity of the grantor of a deed, the opinion of an intimate acquaintance, not a medical man, as to the condition of the grantor's mind, is *competent* when connected with facts and circumstances within his knowledge, and disclosed by him in his testimony, as the foundation of his opinion. *HAND*, J. dissented.

The value and force of the opinion depend on the general intelligence of the witness; the grounds on which it is based; the opportunities he has had for accurate or full observation; and his entire freedom from interest and bias.

Other cases where opinions are admissible, stated and explained.

The *general* rule is that witnesses must speak to *facts*, and that mere *opinions* are inadmissible.

THIS was an action of ejectment, brought to recover the possession of part of lot No. 12 of the second division of the Cambridge patent, and was tried at the Washington circuit, in February, 1849, before Justice *PAGE*. The plaintiff derived title

Culver v. Haslam.

under a deed from Polly Barnhart, the owner of the lot, dated June 2d, 1847, conveying the premises in fee to one Stearns, by whom they were conveyed to the plaintiff. The defendant defended under the heirs of the said Polly Barnhart, who died subsequent to the making the deed of the 2d June, 1847; and the question litigated on the trial was whether Polly Barnhart, at the time she executed the deed of the 2d June, 1847, under which the plaintiff claimed, was of unsound mind and incapable of making the said deed, or not. On the trial, the counsel for the plaintiff introduced a witness who testified that he had been a merchant, and was then a farmer; that he had been acquainted with Polly Barnhart for seven years previous to the date of the said deed, and until her death; that he had transacted business with her, and that in 1843 he presented an account against her, for about four dollars, and could not make her understand any thing about it; that previous to that time he had dealings with her, and she fully understood the accounts which he presented to her. The defendant's counsel then asked the witness "whether, from her appearance at the time he presented the last account, and from the facts and circumstances within his knowledge, which took place at the time, Polly Barnhart was at that time, in his opinion, incapable of transacting business by reason of the unsoundness of her mind and her want of mental capacity." This was objected to by the plaintiff's counsel as incompetent, on the ground that the opinions of witnesses other than medical men and experts, are not admissible evidence to prove insanity or a want of mental capacity to transact business, and insisted that witnesses other than medical men and experts could only speak of the circumstances and acts, and state the facts within their knowledge in relation to Polly Barnhart, and let the jury, from such evidence, draw their conclusions in relation to her mental capacity.

The judge decided that the opinions of witnesses other than medical men and experts, in relation to the insanity of Polly Barnhart, or her mental capacity to transact business, were competent evidence, if founded on facts and circumstances within their own personal knowledge, and which they should testify to

Culver *v.* Haslam.

and give in evidence as the foundation of such opinions, and that the witness might give his opinions in evidence to the jury on that subject, if founded upon facts and circumstances within his own personal knowledge, in connection with such facts and circumstances to be testified to by him as the foundation of such opinion. To which opinion the plaintiff's counsel excepted. The witness thereupon answered the question "that from his acquaintance with Polly Barnhart, and from his personal knowledge of her and her acts, he was of opinion that she was not capable of transacting business understandingly at the time he presented his last account to her." Under the same decision other witnesses, not medical gentlemen, were examined, but were allowed to speak their opinions from and at the time of the occurrences of facts within their knowledge, and to which they testified before they expressed their opinions. Other testimony was given in the case, on both sides, as to the mental capacity of the said Polly. The learned judge, in charging the jury, remarked, among other things, that the opinions of the witnesses who were not professional men, were entitled to very little weight, and that such opinions were only admissible as being founded on facts within the knowledge of such witnesses, and in connection with the evidence of such facts. The plaintiff's counsel excepted to the charge. The jury found a verdict for the defendant; and a motion was made by the plaintiff for a new trial, on a bill of exceptions.

L. J. Howe, for the plaintiff. The opinion of witnesses, other than professional men and experts, are incompetent evidence to prove lunacy or insanity. The only legal evidence on such subjects, except in cases of witnesses to a will or on questions of science and skill, consists of the acts and declarations of the party, evincing a want of capacity. It is for the court and jury, not the witnesses, to form opinions from the facts. The witnesses must give the facts only, and the court or jury must give the judgment. (*Sears v. Shafer*, 1 *Barb. S. C. Rep.* 408, 411, 412.) People entertain opinions on almost every subject that comes before a court of justice, some on one side and some on

Culver v. Haslam.

the other; and if one man's opinion is evidence, every one's is so. But the jury is to keep together in order to exclude all mere opinions, and to decide on the merits, according to their own opinions founded on the facts in evidence, and not on the opinions of other persons. "Mental capacity," and "disposing mind," and "unsound mind," are legal terms, and have a legal definition, with which witnesses are not acquainted, and which they are not to state. But they must state the party's degree of intelligence or imbecility, in the best way they can, so as to impart to the court and jury a knowledge of the meaning of the witness, that they may decide what was the party's state of mind and capacity. (*Cowen & Hill's Notes*, 759.) On the next page the author cites some cases of the states where a different rule seems to be practiced; but he dissents from regarding them as authority in this state, and says, "these cases are too anomalous to be relied upon." (*Cowen & Hill's Notes*, 760. *Stark. Ev.* 1735, 6. *Phil. Ev.* 290. 4 *Denio*, 370, 373, 374, 311, 318. 17 *Wend.* 136, 161. 23 *Id.* 354.) The witnesses whose opinions were received as evidence in this case, had no means of knowledge on the subject, beyond the range of the jury. (1 *Paige*, 173, 4. 1 *Denio*, 374. 1 *Greenl. Ev.* p. 548, § 440.) A person of "sound mind" can convey real estate. The terms "unsound mind" are legal terms, and have a determinate legal signification, importing not merely debility of mind, but a total deprivation of reason. (26 *Wend.* 300, 301.) What did the witnesses in this case know of the meaning of those scientific terms? And what did they know of the philosophy of the mind; or how much legal capacity the party had; or how much it was necessary she should possess to render her legally competent to transact business?

C. L. Allen, for the defendant. I. The only question in this case is, whether the judge decided correctly in admitting the evidence of the opinion of witnesses as to the sanity of Polly Barnhart, at the time she executed the deed to Stearns, on 2d June, 1847. He confined the witnesses to *facts* within their own knowledge, and acts and circumstances which they had

Culver *v.* Haslam.

witnessed, and to which they had testified, and he required them to found their opinion on such facts and circumstances alone. In this he decided correctly. It is undoubtedly true, as a general rule, and will not be disputed, that the opinions of witnesses, other than medical men, are not admissible in evidence to prove insanity or a want of mental capacity to transact business, when their opinions are founded on facts at large, or on the testimony of other witnesses. But when such opinions are based on facts within the knowledge of the witness, and to which he has testified, and he speaks from those facts alone, it has ever been held in this state, down to within a very recent period, that such testimony is proper. See authorities hereafter cited. It has also been so held in other states. On trying a defence to a promissory note in Connecticut, on a question of lunacy, *witnesses, not professional*, were allowed to state their opinions, though held these must be given in connection with the facts on which they were formed. (*Grant v. Thompson*, 4 Conn. R. 203, 208, 9. *Cowen & Hill's Notes*, part 1, 760.) The court rely on Swift's evidence, who makes *sanity* an exception to the general rule. He says "*the testimony of witnesses on this subject will generally be in the shape of an opinion. But, they must detail the facts.*" So in Pennsylvania, where the witnesses spoke from *actual knowledge of the testator*. (*Wogan v. Small*, 11 Serg. & Rawle, 141.) The court allowed the broad question to be put, "*Did you think the testator fit or unfit to make a will?*" In the same state it was held that *facts*, and *opinions* of sanity founded on them, may as to a testator, be received from any of his acquaintances. (*Rambler v. Tryon*, 7 Serg. & Rawle, 90.) The same has also been virtually held in Massachusetts. (*Hathorn v. King*, 8 Mass. R. 371.) In Vermont, too, the court say "*Testimony of opinion may be given, where, from the general and indefinite nature of the inquiry, it is not susceptible of direct proof.* Thus, upon a question of insanity, *witnesses not professional men, may be permitted to give their opinion in connection with the facts observed by them.* But this evidence is *always confined to those who have observed the facts, and is never permitted where the opinion of the witness is derived from*

Culver v. Haslam.

the representation of others." Upon a question of insanity, for instance, witnesses who have observed the conduct of the patient, and been acquainted with his conversation, may testify to his acts and sayings, and give the result of the observation. (*Lester v. Town of Pittsford*, 7 *Verm. R.* 158, 161.) In England too, in *Lowe v. Jolife*, (1 *W. Black. R.* 365,) opinions of witnesses as to sanity were taken on both sides. But where mere opinion is required upon a given state of facts, that opinion is to be derived from professional men. For instance, an offer to prove by witnesses on a given state of facts that in their opinion a road was unsafe, such evidence would undoubtedly be improper. But without resorting farther to other states, let us come down to our own. The leading case is *Jackson v. King*, (4 *Cowen*, 207.) There the *opinion* of witnesses was received, and the propriety of the evidence does not seem even to have been questioned. The court say, p. 218, the opinion of the witnesses seems based on specific facts, which do not warrant an opinion to that extent. In *Clark v. Fisher*, (1 *Paige's Ch. R.* 171,) after speaking of the general principles of law in relation to the capacity of a person to make a will, the chancellor remarks: "That the great difficulty which generally exists, is, in applying those principles to the testimony in each particular case. The evidence of capacity on which the court or jury are to decide, in most contested cases, consists in the opinions of witnesses, sometimes *with*, but frequently *without*, the particular facts on which such opinions are founded." No objection was taken to the *opinions* of the witnesses being given in evidence. This case is analogous to the case of *McKee v. Nelson*, (4 *Cowen*, 356.) Action for breach of promise of marriage; offer to prove opinions of witnesses, grounded on the plaintiff's deportment, &c. that plaintiff was sincerely attached to defendant. The court say, "It is true, as a general rule, that witnesses are not allowed to give their opinions, but there are exceptions, and we think this one of them. There are a thousand nameless things indicating the existence and degree of the *tender passion*, which language can not specify. The opinions of witnesses on this subject must be derived from a series of in-

Culver *v.* Haslam.

stances passing under their observation, which, yet, they never could detail to a jury. So in cases of insanity; how could witnesses detail the particular manner, acts, position, gestures, and a thousand nameless things which they would witness, and the cause of which would be perfectly manifest? In general the opinion of a witness is not evidence for a jury, though there are exceptions. But they proceed on the principle that the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge with the witness. (*Lamoure v. Caryl*, 4 *Denio*, 370, 373.) In the case of *The People v. Freeman*, (4 *Denio*, 9,) several professional and other witnesses who had seen and known the prisoner, and conversed with him, severally gave their opinions that he was sane. This testimony was commented upon by counsel on both sides and by the judge, who remarked that the opinions of the witnesses, not medical men, though proper, were not entitled to as much weight as those of professional men, or those who had been the attendants and close observers of the prisoner. The case of *Norman v. Wells*, (17 *Wend.* 136,) relied upon on the other side, is in fact an authority for the defendant. It decides that opinions of witnesses on probable amount of damages are inadmissible. Cowen, Judge, p. 163, says, "I know that in questions of insanity some courts allow witnesses to throw in their opinions from what they have seen and heard, and so in cases of breach of promise of marriage, and as to the state of the affections in actions for criminal conversation. But the witnesses are only allowed to speak from facts within their own knowledge, (*Trelawny v. Colman*, 2 *Starkie*, 191,) and they should be confined to that. *Sears v. Shafer*, (1 *Barb. S. C. R.* 408,) will also be relied on by plaintiff. That case records the simple *dictum* of Judge Barculo, sitting alone, and citing Cowen and Hill's Notes, 759, which do not bear him out; and he remarks, that the witnesses have very freely given their opinions, *in many instances without stating a single fact to sustain them*.

II. The court having correctly charged the jury, that the opinions of the witnesses, confined as they were to facts with-

Culver *v.* Haslam.

in their own knowledge, were entitled to very little weight, and having fully and fairly commented on all the testimony, the plaintiff has sustained no injury. The charge was not even excepted to. The motion for a new trial should therefore be denied and judgment be rendered for defendant on the verdict. It is at most only a question of costs, as the plaintiff can have a new trial under the statute, on payment of costs. And if he chooses to do so, he ought pay costs for the privilege.

WILLARD, J. The general rule, no doubt, is, that witnesses must speak to facts, and that mere opinions are not admissible. (1 *Phil. Ev.* 290. 1 *Greenl. Ev.* 593, § 450. *Cowen & Hill's Notes to Phil. Ev.* 759. *Sears v. Shafer*, 1 *Barb. S. C. Rep.* 408.) There are, however, numerous exceptions to the rule, most of which will be found stated in the authors above cited. On the present occasion it becomes important only to inquire, whether the questions proposed to, and answered by, the witnesses, and the charge of the learned judge, fall within the exceptions.

The cases in which the mental capacity of a party becomes a subject of judicial investigation, arise, most frequently, upon wills. The practice in these cases, in the English ecclesiastical courts having jurisdiction in testamentary matters, has been long well settled. In *Sheaff v. Rowe*, (2 *Lee*, 180,) decided in 1757, it was held that the opinions of doctors and apothecaries concerning a man's capacity, from the nature of his disorder, were good evidence, and that other witnesses must set forth particular facts and expressions to show insanity; otherwise their evidence would have no weight. The general principles which influence the court are fully stated by Sir John Nicholl in the well considered case of *Kinleside v. Harrison*, (2 *Phillim. Rep.* 449.) In assigning the reason for the great amount of contradictory evidence, in the causes in those courts, he remarks that a large portion of *evidence to capacity is evidence of mere opinion*; and upon matters of opinion mankind differ, even to a proverb. He then proceeds to show how these opinions are to be estimated; a point not material on the mere

Calver v. Haalam.

question of *admissibility*. The case of *Wheeler v. Alderson*, (3 *Hagg.* 574,) affords further illustration of the manner in which the opinions of witnesses are received in such cases.

The opinions of medical men are admissible in evidence, though the witness founds them not on his own personal observation, but on the case itself, as proved by other witnesses on the trial. They can not, however, be permitted to give their opinions as to the general merits of the cause, but only their opinions on the facts proved. (*Jameson v. Drinkald*, 12 *Moore*, 148. *Rex v. Wright*, 1 *Russ. & Ryan*, 456.) The witness is not to take the place of the jury.

The books make a distinction also, between the *subscribing witnesses* to a will and other witnesses called to the question of testamentary capacity; holding that the former may testify to their *opinions*, in respect to the sanity of the testator at the time of executing the will, and that the latter must speak only as to facts; for the law has placed the subscribing witnesses about the testator to ascertain and judge of his capacity. (4 *Greenl. Ev.* 595, § 440.) In the neighboring states the rule seems to be well established, that on questions of sanity, any witness may give his opinion, in connection with facts within his own knowledge, and which must first be disclosed in his testimony. But when mere opinion is required upon a given state of facts, that opinion must be derived from professional men. (See *Chase v. Lincoln*, 8 *Mass. Rep.* 237; *Poole v. Richardson*, *Id.* 330; *Rambler v. Tryon*, 7 *Serg. & Rawle*, 90, 92; *Buckminster v. Perry*, 4 *Mass. Rep.* 593; *Grant v. Thompson*, 4 *Conn. Rep.* 203; *Kinne v. Kinne*, 9 *Id.* 102; *Doe v. Reagan*, 5 *Blackf.* 217.) When from the general and indefinite nature of the inquiry it is not susceptible of direct proof, testimony of opinion is admissible; provided that opinion is formed on particular facts within the knowledge and observation of the witness, and disclosed by him in his testimony. (*Clary v. Clary*, 2 *Iredell*, 78. *Lester v. Town of Pittsford*, 7 *Verm. Rep.* 158, 161. 17 *Id.* 499. *Gibson v. Gibson*, 9 *Yerger*, 329.)

The same doctrine will be found in our own reports. Thus, in *Jackson v. King*, (4 *Cowen*, 207, 218,) although the testi-

Culver v. Haslam.

imony is not given at large, it is obvious from the opinion of the court, as delivered by Woodworth J. at page 218, that the opinions of the witnesses on both sides of the question were received without objection. While the learned judge gives credit to those witnesses who pronounced the grantor, in their opinion, of sound mind, he observes that the *opinions* of the other witnesses impeaching his capacity rested on specific facts, which did not warrant the opinion, to that extent. In *Clark v. Fisher*, (1 *Paige*, 171, 173,) which was an appeal from a surrogate in admitting a will to probate which had been opposed on the ground of the testator's mental incapacity, the chancellor, after stating the principles of law in relation to the capacity requisite to the validity of a will, remarks, that this evidence of capacity on which the court or jury is to decide, in most contested cases, consists in the *opinions of witnesses* sometimes with, but frequently *without* the particular facts on which such opinions are founded. Such testimony, he observes, is always the most unsatisfactory, and the least to be depended on. And further on, he observes, "that the opinions of witnesses are never received as evidence when all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. And when the opinions of witnesses, from the necessity of the case, are received as evidence, the weight of testimony will not depend so much upon the number, as upon the intelligence of the witnesses, and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts testified to, in support of those opinions."

In *Norman v. Wells*, (17 *Wend.* 137, 163,) Mr. Justice Cowen, after repudiating the admissibility of *opinions*, on mere questions of damages, concedes that in questions of insanity, some courts allow witnesses to throw in their opinions, from what they have seen and heard. But he observes that he always found that such cases were better tried, when opinions were kept entirely out of view; and that he generally excluded them, except when they came from professional men. And he further on remarks, that the witness who is allowed to give his opinion

1

Culver *v.* Haslam.

must be confined to facts within his own knowledge and his own actual observation.

In the case of *Stewart's Executors v. Lispenard*, (26 Wend. 255,) it appears by the surrogate's return on the appeal that the opinions of the witnesses were repeatedly given as to the capacity of the testatrix. With respect to their opinions, the surrogate says, (see page 264) "mere opinion or general statements, not instructed with facts and circumstances, are entitled to little weight or consideration;" and the chancellor at page 291 concurs with the surrogate in substance, in that respect. Although the decree of the surrogate and of the chancellor was reversed by the court of errors, it was upon a point not affecting the question of admissibility of opinions as evidence in cases of that nature; but on the contrary, Verplanck, senator, who delivered the prevailing opinion of the court of errors, at pages 308-9, treats the evidence of opinion not only of the subscribing witnesses, but of the other witnesses, as admissible, agreeing with Washington, J. in 3 *Wash. C. C. R.* 58, that "mere opinions of witnesses, as to mental capacity are entitled to little or no regard, unless supported by good reasons, founded on facts which warrant them." The case of *Fish v. Dodge*, (4 *Denio*, 312, 318,) and of *Lamoure v. Caryl*, (*Id.* 370, 374,) merely show that on questions of damages, opinions of witnesses are inadmissible, and the reason assigned by Justice Beardsley, in the latter case, shows the propriety of questions of insanity being an exception to the general rule.

The recent case of *Sears v. Shafer*, (1 *Barb. S. C. Rep.* 409,) before Barculo, J. at special term, is not in conflict with these principles. The learned judge states the general rule truly, that it is for the court and not the witness to form an *opinion* from the facts. He correctly makes the exception in case of the subscribing witnesses to a will, who are allowed to express their opinions; and, by implication, he sanctions the other exception, which allows witnesses to express their opinion as to the capacity of the testator, in connection with facts and circumstances within their knowledge, disclosed by them on the trial. He says, "in this case, the witnesses have very freely given their

Culver v. Haslam.

opinions on this subject, [the testator's capacity,] in many instances without stating *a single fact to sustain them*. *All such testimony must be disregarded.*" &c. Apart from the difficulty of restraining a witness from intermingling his opinions with his testimony, in questions of this kind, there are strong reasons why he should be permitted to do so, when he discloses the facts and circumstances within his own knowledge, upon which they are founded. Human language is imperfect; and it is often impossible to describe, in an intelligible manner, the operations of the mind of another. We learn its condition, only by its manifestations, and these are indicated not alone by articulate words, but by signs, gestures, conduct, the expression of the countenance, and the whole action of the man. Nor is there any danger that a court and jury will be misled by such opinions, when the reasons for them are disclosed. The value and force of the opinion depend on the general intelligence of the witness, the grounds on which it is based, the opportunities he has had for accurate and full observation, and his entire freedom from interest and bias. I agree with Judge Cowen in *Norman v. Wells*, that causes are in general better tried without them, and I concur with him, the chancellor, Senator Verplanck and Judge Barculo, that mere opinions, of an ordinary witness, unless supported by good reasons, and founded on facts, are entitled to no regard. The question under consideration is, not what *weight* should be given to such opinions, but whether they were *competent*. The learned judge correctly instructed the jury that they were entitled to but *little weight*. I think he was right also, in holding them *admissible*, with the qualifications under which they were received.

There are other exceptions to the general rule with respect to the competency of opinions, which, if fully examined, would throw light on the principal question. On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify to facts, but are permitted to give their opinions in evidence. The opinions of medical men are constantly admitted on subjects within the range of their profession; and the same is true of ship builders,

Culver v. Haslam.

nautical men, (a) engineers, &c. Practical surveyors have invariably been permitted, at the circuit, to express their opinions whether the marks on trees, piles of stone, &c. were intended as monuments or boundaries, (b) whether a particular mark indicated a corner, or was a mere witness; whether a given line was an ancient or a recent line; and whether it was a surveyor's line, or one marked by hunters. So also opinions and belief have always been received in cases of personal identity, hand-writing, counterfeiting coin, bank bills and the like. (c) But in all these cases the requisite foundation for the opinion must be laid, by showing that the witness had some knowledge of the subject. Thus a witness can not be permitted to give his opinion as to the genuineness of hand-writing, unless he has before seen the party write, or corresponded with him, or otherwise become acquainted with his genuine signature. The character of this kind of evidence differs almost infinitely in degree. (*Wilson v. Kirkland*, 5 *Hill*, 182. 21 *Wend.* 557. *Murphy v. Hagerman, Wright*, 293. 4 *Dev. & Batt.* 236. 4 *Hill*, 129. 17 *Vt.* 499. 1 *Denio*, 281. 11 *N. H.* 557. 2 *Metc.* 147. 4 *Blackf.* 293. 5 *Id.* 217. 3 *Dana*, 382, as to identity of a party. 4 *Wend.* 320. 3 *Fairf.* 222. 6 *Conn. Rep.* 9, as to age; opinion admissible, giving facts. 4 *Cowen*, 355, as to the seniority of an attachment, from facts. *Cutler v. Carpenter*, 1. *Cowen*, 81, shows that a witness can not swear to belief, when such belief is not based upon facts. 1 *John.* 96, when a witness may give his impression.) But it is unnecessary to enlarge upon the subject.

The testimony was properly received, and the motion for a new trial should be denied.

(a) 1 *Carr. & Payne*, 70.

(b) 4 *Pick.* 156. 10 *Barn. & Cress.* 527.

(c) Also as to the value of property. (*Swift's Ev.* 111. *Kellogg v. Kramer*, 14 *Serg. & Rawle*, 137. But see *Rochester v. Chester*, (3 *N. Hamp. Rep.* 349, 365, *contra*.) In *Morse v. The State of Connecticut*, (6 *Conn. Rep.* 9,) mere naked opinion as to the age of a party, from his appearance only, was rejected. But the court thought that if the witness had stated the facts indicative of age, and then followed with an opinion, that would have been admissible.

Culver v. Haalam.

PAGE, P. J. concurred.

HAND, J. The defence in this case was the insanity or mental incapacity of the grantor in the deed under which the plaintiff claimed. The defendant offered to prove by a witness who was a farmer, and had been a merchant, that from the grantor's appearance at the time he presented a certain account against her, about four years before the deed was executed, and from facts and circumstances within his knowledge, which took place at the time, she was in his opinion at that time incapable of transacting business by reason of the unsoundness of her mind and the want of mental capacity; and also offered to give in evidence the opinions of other witnesses, not medical men or experts, in relation to her mental capacity to transact business, founded on circumstances and acts of the grantor within their own personal knowledge, which they had heard and witnessed, and to which they could testify. The judge decided that the opinions of witnesses, other than medical men and experts, in relation to the insanity of the grantor, or her mental capacity to transact business, were competent evidence, if founded on facts and circumstances within their own personal knowledge, and which they should testify to and give in evidence as the foundation of such opinions, and that this witness and others, other than professional men and experts, might give their opinions in evidence to the jury on that subject, if founded upon facts and circumstances within their own personal observation, in connection with facts and circumstances to be testified to by other witnesses. The counsel for the plaintiff excepted. The judge, in charging the jury, told them that the opinions of witnesses not professional men were entitled to but very little weight, and were only admissible as being founded on facts within the knowledge of each witness, and in connection with the evidence of such facts. Still, if the testimony was inadmissible there should be a new trial.

The rule, as laid down at the circuit, is found in so many *dicta*, that it was perhaps natural that a judge at *nisi prius* should feel constrained to follow it. But after some examina-

Culver v. Haslam.

tion, I have not been able to find principle or authority to sustain it. In this case, not only were the witnesses allowed to give their opinions of the state of mind of the grantor, but also as to her mental capacity to transact business, judging from facts and circumstances within their own knowledge and to which they should testify, as the foundation of such opinions. They are first to testify to the facts and circumstances, and then draw conclusions from them as to the insanity and business capacity of the grantor. If the opinion of a witness in such cases were at all admissible, I doubt the propriety of asking him whether the party was capable of transacting business; or, which is the same thing, of making the deed. This is giving an opinion upon the merits, and swearing to a verdict. That can not be done, even by a scientific man. (*Jameson v. Drinkald*, 12 *Moore*, 148. *Walton v. Nesbit*, 1 *Car. & Payne*, 70. *Sills v. Brown*, 9 *Id.* 601. *Jefferson Ins. Co. v. Cotheal*, 7 *Wend.* 77, 78, 79. 1 *Greenl. Ev.* § 440. *Cowen & Hill's Notes*, 759.)

But I think the opinions of witnesses, not experts, were inadmissible altogether. The general rule is, that witnesses are to state facts, and not opinions. There are exceptions; as on questions of science and trade, persons of skill may give opinions. (1 *Phil. Ev.* 290. 1 *Stark. Ev.* 54. 1 *Greenl.* § 440. *Norman v. Wells*, 17 *Wend.* 136. *Paige v. Hazard*, 5 *Hill*, 603. *Butler v. Benson*, 1 *Barb. S. C. Rep.* 537.) This being the general rule, and having its foundation in reason, all exceptions should stand upon principle or by authority. I have not been able to find authority in support of the one contended for. In a few cases in this state such testimony has been received; but in none of them was any objection made. Nearly all of them originated before a surrogate, and the appellate courts had to pass upon the cases as they found them. Such a rule seems to have obtained, under certain restrictions, in Massachusetts, Connecticut, Pennsylvania and Ohio. (*Pool v. Richardson*, 3 *Mass. Rep.* 330. *Grant v. Thompson*, 4 *Conn. Rep.* 203. *Wogan v. Small*, 11 *Serg. & Rawle*, 141. *Clark v. State*, 12

Culver v. Haslam.

Ohio Rep. 483.) In *Jackson v. King*, (4 *Cowen*, 207,) the opinions of witnesses were given, but the case does not show what were their qualifications, nor that any objection was taken; nor was the point noticed by the court. The same remark is applicable to *Clark v. Fisher*, which first arose in a surrogate's court. (1 *Paige*, 173.) The chancellor says, "the evidence of capacity, on which the court or jury are to decide, in most contested cases, consists in the opinions of witnesses; sometimes with, but frequently without the particular facts on which such opinions are founded." He could hardly have used this language in reference to persons without skill; for no one contends, I believe, that such persons can give opinions upon the question of insanity, without stating the facts. In the English ecclesiastical courts opinions are sometimes given, but the common law rule, I think clearly different.

But again; whenever such testimony has been received, it has always been very little regarded. Sir John Nicholl, in *Kinleside v. Harrison*, (2 *Phill.* 449,) said, in reference to the testimony given in that case, in which the depositions, as he stated, contained one of the largest bodies of evidence ever exhibited in those courts, that "it was necessary for the court to weigh such evidence with very great attention; to rely but little upon mere opinion; to look to the grounds upon which opinions were formed; and to be guided in its own judgment by facts proved or by acts done, rather than by the judgment of others." This he repeated in *Evans v. Knight*, (1 *Addams*, 229,) "There is produced," said he again, "a cloud of witnesses who gave unhesitating opinions that the deceased was mad; but their opinions are of little weight;" and he established the will. (*Wheeler v. Alderson*, 3 *Hagg.* 574.) In *Jackson v. King*, the court looked to the facts, and disregarded opinions; and set aside the verdict. (4 *Cowen*, 207.) In *Clark v. Fisher*, Chancellor Walworth considered such testimony as the most unsatisfactory and the least to be depended upon. And he observes that the opinions of witnesses are never received as evidence where all the facts on which such opinions are founded can be ascertained

Culver v. Haslam.

and made intelligible to the court or jury, and that where from necessity opinions are received, the weight of testimony depends not so much on the number as upon the intelligence of the witnesses, their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts testified to in support of those opinions. (1 *Paige*, 173, 4.) And see the opinions delivered in *Stewart's Ex'rs v. Lispenard*, (26 *Wend.* 253.) Thus we see, this kind of testimony, when admitted, is held in low esteem, amounting practically to a rejection; for what is disregarded, is substantially rejected; and yet may have an influence with the jury which is not so easily corrected. They should not be left to speculate upon testimony, upon which the court will not rely.

The weight of authority is clearly against this evidence. The English elementary works on evidence do not recognize the practice. (1 *Phil. Ev.* 290. 1 *Stark. Ev.* 54. 3 *Id.* 1707. *Shelf. on Lun.* 67, 73. *Swinburne*, 72.) Judge Cowen disapproved of it in *Norman v. Wells*, (*supra*.) Mr. Justice Barculo ruled against it in a case like this, of a grantor. (*Sears v. Shaffer*, 1 *Barb. S. C. Rep.* 412.) If admissible at all then, it must be so, not upon authority; but from the reason and the nature of the case. But if any advantage can be derived from science and experience, if the subject can be reduced to rules, laws, or system in any degree, the general rule in relation to giving testimony in cases of insanity, should apply. That science is useful and necessary in these cases, no sensible man can doubt. It is not possible that all the writers upon the human understanding, from Locke to the present day, have been wholly ignorant of the subject of which they have so elaborately treated. All judicial and professional experience confirms the wisdom of this general rule, and bears witness to the fallacy of the exception now attempted to be established. What would have been the result if the cases of *Cartwright v. Cartwright*, (1 *Phill.* 90,) *Dew v. Clarke*, (3 *Addams*, 79,) and *Jackson v. King*, (4 *Cowen*, 207,) had been left to the judgment, opinions, conjectures or caprice of illiterate and inexperienced witnesses? If such testi-

Hull v. Peters.

mony is received, it must have its legal effect; and I am unable to perceive any satisfactory reason for placing life, liberty and property within its influence.

New trial denied.(d)

(d) See Note 173 to vol. 3 Phil. Ev. 3d ed. of 1849. The point decided in this case was adopted by the Commissioners of the Code, in their article on Evidence, published after the prevailing opinion was prepared. (See *Code*, § 1704, sub. 10, page 712.)

ERIE GENERAL TERM, November, 1849. *Mullett, Sill, and Marvin, Justices.*

HULL and others vs. PETERS.

Where a *tender* is made, after the creditor has employed an attorney to bring a suit, who has filed a declaration, and mailed a copy to the sheriff, to be served, but before the same is served, it is sufficient for the debtor to tender the amount of the debt, without offering to pay the plaintiff's costs; especially if the debtor, at the time of making the tender, does not know, and is not informed by the creditor, that costs have been incurred. MARVIN, J. dissented.

Retan v. Drew, (19 Wend. 304,) overruled.

THIS action was commenced by the filing and service of a declaration, before the adoption of the code of procedure. The declaration was upon a judgment, and the defendant pleaded a tender, before suit brought. The plaintiffs replied that they had employed an attorney to bring this suit, who had, before the tender, filed a declaration in the office of the clerk of Allegany county, and sent by mail to the sheriff of New-York, a copy to be served; that these facts were known to the defendant, but the costs then incurred were not tendered. The defendant rejoined, denying that he knew, when the tender was made, of the proceedings for commencing the suit, and alledged that the plaintiffs omitted to inform him of them, and at that

Hull *v.* Peters.

time made no claim for costs; that the sole reason given for refusing the tender was, that the plaintiffs did not know the amount of the judgment, upon which the suit was brought, and although the defendant informed them of the true amount, they still refused the tender, assigning no other reason for the refusal. The surrejoinder took issue upon the matter set up in the rejoinder. Upon the trial of those issues, the defendant had a verdict. The plaintiffs now moved for judgment *non obstante veredicto*.

A. J. Hull & L. C. Peck, for the plaintiffs.

Wilkes Angel, for the defendant.

SILL, J. The plaintiffs, to sustain this motion, rely upon the following cases, which, it is claimed, establish the doctrine that the tender pleaded in this case was not a defence to the action, because the costs which had been made about commencing a suit were not included in the tender. (*Hanmer v. Wilsey*, 17 *Wend.* 91. *Retan v. Drew*, 19 *Id.* 304. *Johnson v. Comstock*, 6 *Hill*, 10. *Brown v. Ferguson*, 2 *Denio*, 196.) In the first case cited, the question did not arise, although it is there said, that in such case costs should be tendered. The action was trespass for taking a horse. After the filing of a declaration and entry of a rule to plead, for the purpose of commencing a suit, the defendant returned the horse to the plaintiff's stable, who refused to receive him, and proceeded with the action. On the trial the defendant offered evidence of these facts in mitigation of damages. The point decided in that case arose upon this offer. The testimony was held inadmissible, but for reasons having no application to the case before us. If the horse had been returned and accepted by the plaintiff, it was, as a mere matter of mitigation, immaterial whether the return was before or after the suit was brought. In either case the return and acceptance would mitigate the damages. And in either case would such return and acceptance, with a tender

Hull v. Peters.

of costs, bar the action. All that was said in that case, which might otherwise be applicable to this, was *obiter dictum*.

In *Retan v. Drew*, however, the point was presented and decided. The action there was assumpsit, the plea tender before suit brought. The plaintiff replied that the tender was made after the declaration was filed, though before it was served, that the damages alone and no costs, were tendered. Upon demurrer to the replication the court held it good, upon the ground that the plaintiff was entitled to the costs of preparing to commence his suit. The distinguished judge who delivered the brief opinion of the court in that case said that the *action was not commenced* for all purposes, yet the plaintiff before the tender having employed an attorney, and incurred expense, and proceeding with all diligence to serve the declaration, the tender was insufficient without an offer to pay costs, and that *a different rule would work injustice*. The authorities cited for this opinion are 19 *Wend.* 91, 2 *John. Cases*, 145, and 2 *John. R.* 342. The first of these cases has been already examined and shown to have no applicability to this question. That in Johnson's Cases decides that the *issuing of a capias* was the commencement of a suit, and that a demand against the plaintiff, acquired subsequently by the defendant, could not be made available as a set-off. The case in Johnson's Reports decides that an averment in a plea, that a cause of action was settled before the capias was sued out, is a good averment that the settlement was before the suit was brought. Thus it will be observed that we do not find any authority or precedent for the judgment in *Retan v. Drew*, and we shall not find it supported by subsequent adjudications. The case of *Johnson v. Comstock*, which is the next in order of those cited by the plaintiffs' counsel, was also commenced by the filing and service of a declaration, without the issuing of a capias ad respondentum. The declaration was filed and the rule to plead entered on the second day of June, 1838, and on the same day a copy was delivered to one Harrington to serve, but it was not served till the 8th day of June. On the 7th of June the defendant purchased a note against the plaintiff, which on the trial he offered as a set-off.

Hull *v.* Peters.

It will be recollected that the statute allows a set-off in those cases only in which the demand offered for that purpose is owned by the defendant when the action is commenced. The decision was that the action was not commenced till the eighth day of June, and that the set-off should be allowed. The point before us was not there presented, although the court took occasion to reassert the doctrine of *Retan v. Drew*.

In *Brown v. Ferguson*, the plaintiff had retained an attorney, who had drawn a declaration and sent it to be filed. Before it was in fact filed, the defendant tendered the amount of the debt and the costs which had been made, which the plaintiff's attorney refused to receive. The verdict was less than the principal sum tendered. The defendant, relying no doubt, on the decision and dicta above noticed, supposed that the suits must be treated as pending, for the purpose of making him chargeable with the plaintiff's costs. And he relied upon his tender as one made *after suit brought*, pursuant to 2 R. S. 553. § 20. The court, however, held otherwise; deciding that no suit was pending, and therefore the statute did not apply. They say, the plaintiff had incurred costs, which the defendant was bound to pay, "but the suit was not commenced until the declaration was filed and served." Some remarks of Mr. Justice Bronson, in *Hanmer v. Wilsey*, and in *Retan v. Drew*, were calculated to leave the impression that although a suit instituted by filing and serving a declaration was not for all purposes commenced, until the service was made, still it might be regarded as pending, for the purpose of determining the plaintiff's right to costs, as soon as expenses were incurred in good faith for the purpose of instituting it. But the same judge, in *Johnson v. Comstock*, disclaims such a construction of his remark, and there now exists no authority for saying that a suit commenced in this mode is to be regarded as pending, for any purpose, before the declaration is filed.

At common law a debtor has a right to tender the debt to his creditor, and if the tender is made before a suit is instituted for its collection, such tender is a bar to a recovery. Whenever a suit is brought, the statute before cited permits the defendant to

Hull v. Peters.

tender the debt and the costs which have accrued, and to have the amount tendered struck out of the plaintiff's declaration. The practice differs somewhat, accordingly as the tender is made before or after a suit is pending, but the effect of it upon the substantial rights of the parties is the same. The design of the statute undoubtedly was, that the statutory remedy should accrue as soon as the right of a common law tender was suspended. In other words, until suit actually brought, the common law tender was efficacious as a defence, and when the suit was commenced the right under the statute accrued. The case relied upon by the plaintiffs here, if sound, introduces a new class not within either of these rules. It holds that there is a period, before the right to make the statutory tender arises, when the old common law tender is ineffectual, unless the debtor submit to an additional burden, not imposed by his own contract, or any statute. The decision rests solely upon the moral equity of the case—that the debtor should reimburse to the creditor expenses necessarily incurred by reason of the neglect of the former punctually to perform his obligations. With due deference I submit that the case of *Retan v. Drew* is a departure from settled principles, and is not sustained by authority.

The revised statutes provided that if after appearance by the defendant the plaintiff be nonsuited, or discontinue his suit, &c. the defendant should have judgment for costs. In the case of *White v. Smith and others*, (4 *Hill*, 166,) the plaintiff voluntarily discontinued his suit, before an appearance by the defendant; but after the latter had retained an attorney and incurred expenses about defending the suit. The supreme court, upon the authority of *Robinson v. Taylor*, (12 *Wend.* 191,) and as I conceive upon the equitable considerations to which they yielded in *Retan v. Drew*, held that the defendant was entitled to costs. The court for the correction of errors reversed the decision, (7 *Hill*, 520,) and laid down the doctrine that the right to his costs in suits at law depends in all cases upon the statute alone. The defendant not having appeared before the discontinuance, he was not within the provisions of the statute giving costs. The principle which that case established is applicable to and

Hull *v.* Peters.

should govern the one before us. Costs are recoverable, not simply because their recovery is just, but because the statute gives them. There is no statute giving a creditor the expenses of preparing to bring a suit, as such. Until a suit be actually commenced, the statute knows no such thing as costs. When an action is pending, and not until then, they become an incident to the litigation. I am of the opinion, therefore, that the tender of the debt, in this case, was sufficient, without paying the plaintiff's costs.

There is another circumstance, independent of what has been said, which will justify a denial of this motion. One of the issues made by the pleadings was, whether the defendant knew, when he made the tender, that any expenses had been incurred about the institution of a suit. The general verdict for the defendant finds this issue for him. It also appears that ignorance of the amount of the original judgment upon which this suit was brought, was the reason given on the part of the plaintiffs for refusing the tender. The plaintiffs, as we have seen, must rest their claim to costs in addition to their debt, upon the equities of their case. In this view it was most clearly their duty to have apprised the defendant of this additional claim. They should not have placed their refusal of the principal debt upon untenable ground; thus misleading the defendant. They could not expect that he would offer to pay a claim, of the existence of which he was ignorant. Under such circumstances, they should not be heard to set up this latent claim for costs, to defeat what was otherwise a legal and sufficient tender. It was decided in *Haskell v. Brown*, (2 *Fairf. Rep.* 258,) and I have no doubt correctly, that a trustee could not be so defeated. I am of the opinion that judgment should be entered for the defendant on the verdict.

MULLETT, P. J. concurred.

MARVIN, J. dissented.

Judgment for the defendant.

SAME TERM. *Before the same Justices.*

RICE and THORP vs. MILKS.

Under the 6th section of the 4th title of the 2d chapter of the 3d part of the revised statutes, suspending the jurisdiction of justices of the peace, under that title, in case they shall become inn-holders or tavern-keepers, in fact, after their election, and chapter 140 of the laws of 1846, amending that section, a justice of the peace is not disqualified to entertain proceedings against a person for refusing to work upon the road, on the complaint of an overseer of the highways; although such justice was, at the time of his election, and when the proceedings were had, a tavern-keeper.

Those statutes relate, solely, to the civil jurisdiction of justices of the peace under title 4 of the 2d chapter of the 3d part of the revised statutes; and do not interfere with the powers conferred by other statutes.

MILKS sued Rice and Thorp in a justice's court, and recovered a judgment against them, in a plea of trespass *de bonis asportatis*. The defence set up was, that Thorp, being an overseer of the highway, had warned Milks to work on the road. He neglected to appear, and Thorp made complaint to Rice, who was a justice of the peace. The latter issued a summons requiring Milks to appear and show cause why he should not be fined according to law. Upon the return of the summons Rice imposed a fine on Milks, and issued a warrant for its collection. Under this warrant the property of Milks was seized and sold, which was the trespass for which the respondent recovered before the justice. It was admitted that all the proceedings against Milks, before Rice, were regular and in conformity to the statute. Rice, at the time he was elected, and at the time of the proceedings against Milks, before him, was a tavern-keeper. On the trial of this cause, the justice decided that Rice was thereby disqualified to act on the complaint of Thorp, and that both he and Thorp were trespassers. The county court of Allegany county affirmed the justice's judgment, and the case was brought here by appeal.

Rice *v.* Milks.

Mr. Grover, for the appellants.

Mr. Wetherby, for the respondent.

By the Court, SILL, J. This case involves a construction of the following section of the revised statutes, as amended in 1846. "If after the election of any person as a justice of the peace, he shall become an inn-holder or tavern-keeper, in fact, he shall not have any power or jurisdiction under the provisions of this title; but he may issue execution upon any judgment actually rendered by him before he became so disqualified. (*Rev. Stat. part 3, chap. 2, tit. 4, § 6.*) The supreme court decided that if a person elected as a justice was a tavern-keeper at the time of his election, this section did not disqualify him. (*Parmelee v. Thompson, 7 Hill, 77.*) It was then provided by chapter 140, of the laws of 1846, that no justice of the peace *being* an inn-holder or tavern-keeper, in fact, should have any power or jurisdiction under title 4 of chapter 2 of the revised statutes above cited.

It is supposed by the counsel for the respondent that the act of 1846 disqualified Rice to entertain the proceedings had before him against Milks. This provision, it will be observed, in fact, though not in express terms, is an amendment by way of addition to that section of the revised statutes quoted above. Both, in terms, suspend, in a certain contingency, the civil jurisdiction which justices of the peace claim from title 4, but neither interferes with powers conferred by other statutes.

The first act, by which justices of the peace were authorized to hold courts for the trial of civil causes in this state, was passed in 1787. This act was revised and in substance re-enacted in the years 1801, 1808, 1813, and 1824. All these statutes, like that of 1830, contained provisions disqualifying a justice, upon his becoming a tavern-keeper, to exercise the powers and jurisdiction which they respectively conferred. But they all related exclusively to the power of justices of the peace while holding courts of civil jurisdiction for the trial of suits between party and party, having no reference whatever to the jurisdiction of a

Rice v. Milks.

justice of the peace, as a criminal magistrate or conservator of the peace, nor to any powers conferred by other statutes. None of these statutes declare the office forfeited if a justice become a tavern-keeper, or suspend any of his powers as a magistrate, except those derived from the acts, of which these restrictions respectively constitute part. The proceedings in justices' courts held pursuant to the several acts referred to, were not summary, but as far as practicable, like the proceedings in courts of record; and the matters triable in them were those which belonged to the civil jurisdiction of common law courts.

The power which Rice exercised, and which is the subject of complaint here, was not derived from title 4 above cited, but was conferred by sections 32, 40, 41, 42 and 43, of an act entitled "of highways and bridges." (1 R. S. 509, 511.) The proceeding before him was a summary one to collect by distress the forfeiture which Milks had incurred, by his disobedience to the lawful requirements of Thorp, the overseer of highways. A provision substantially like that under which the justice acted has constituted a part of every highway act which has existed in this state. It is found in the act of 1784, the 7th section of which provides that any person duly warned by the overseer to work on the highway, who shall neglect or refuse to appear, shall forfeit for every offence, twenty shillings to be adjudged by the overseer of the highway, which shall be collected upon his warrant by distress, &c. In the revised road act of 1801, this provision was amended, so that the overseer, instead of adjudicating himself that a forfeiture had been incurred, and issuing his warrant for its collection, was required to make complaint to a justice of the peace, who proceeded ex parte, and acted ministerially in enforcing the penalty. (3 *Caines*, 260. 3 *John.* 474. 9 *Id.* 231. 10 *Id.* 470.) The highway act of 1813, and that of 1830, are the same, in this respect, as that of 1801; except the two later statutes require the delinquent to be summoned to show cause, before a fine is imposed upon him.

The proceeding is a special and summary one, authorized and regulated by the highway act alone. We are referred by the respondent's counsel to a section of title 4, which confers on

Rice *v.* Milks.

justices' courts jurisdiction of actions for the collection of penalties not exceeding one hundred dollars, given by any statute of this state. (2 R. S. 225.) And it is said this provision embraces the forfeiture in question. It is not denied that authority for the proceedings before Rice may be found in those sections of the highway act which have been cited; but it is insisted, that title 4 gave a concurrent remedy, and that the law of 1846 forbade Rice to entertain any proceedings which might be had under the latter statute, although like authority for their exercise might be found elsewhere. I can not concur in this construction of the act of 1846. The true construction of it is that a justice of the peace, being an inn-holder, can derive no power or authority from title 4. So long as he keeps a tavern it is to him a dead letter—but it does not deprive him of any jurisdiction conferred by any other statute.

But I think the forfeiture of Milks could not have been collected under title 4. It is a familiar rule that if the statute declaring a forfeiture prescribes the tribunal which is to enforce it, and the mode of its collection, exclusive jurisdiction is thus constructively conferred on the tribunal named, and no other court or mode of proceeding can be resorted to.

The proceeding to collect such penalty must be summary. It must be had before a justice of the peace as justice, and not before a *justice's court*; the latter, under title 4, having no jurisdiction for the collection of this forfeiture. The proceedings before Rice were regular and authorized by the statute. The justice erred in declaring them void. His judgment, and that of the county court, should be reversed.

Judgment reversed.

MONROE GENERAL TERM, November, 1849. *Maynard, Welles, and Marvin*, Justices.

MUIR vs. LEITCH & CARR.

Property belonging to a copartnership is not liable for the debts of the individual members of the firm, until the debts of the firm have all been paid.

A judgment does not lose its lien upon real estate, by the suffering of an execution, issued thereon, to lie dormant in the sheriff's hands.

The doctrine on the subject of dormant executions does not apply to real estate; the lien upon which depends upon the docketing of the judgment, and not upon the execution, or levy. And such lien does not become dormant until the expiration of the statutory limitation of ten years.

The affidavit required by the statute (2 R. S. 373, § 60) to be made by a judgment creditor, in order to acquire the title of the original purchaser at a sale of the judgment debtor's real estate upon execution, or to become a purchaser from any other creditor, will not be vitiated by an error in stating the amount due upon the judgment. If the affidavit is made in good faith, and is in proper form, it is all the statute requires.

An agreement made by the assignee of a judgment, with one of the judgment debtors, whereby he postpones the time of payment of the amount due upon such judgment, will not have the effect to postpone the lien thereof, and destroy the same, as against other judgments then existing.

If the holder of a judgment and execution takes a mortgage from one of the judgment debtors, for the amount of the judgment, payable at a distant day, this will not amount to a release of land belonging to another of the judgment debtors from the lien of the judgment and execution.

The fact of a judgment creditor having other security for the debt, besides the judgment, does not, in and of itself, disqualify the judgment from being the foundation of the creditor's right to redeem under the statute, (2 R. S. 373, § 60.)

IN EQUITY. The bill in this cause was filed to compel the defendant Carr, as late sheriff of Cayuga county, to convey to the plaintiff the undivided half of certain real estate situated in the city of Auburn and particularly described in the bill, which Carr had sold as such sheriff, by virtue of an execution upon a judgment in the supreme court in favor of the defendant Leitch against Assaph D. Leonard, which was docketed on the 6th day of May, 1840, for \$30,000 debt, and \$18,04 damages and costs. The premises were sold to Warren T. Worden on the 25th day of September, 1845, for \$500, and the usual certificate of sale

Muir v. Leitch.

given. On the 25th day of September, 1840, James R. Guernsey, president of the Bank of Western New-York, Rochester, recovered a judgment in the supreme court against Robert Muir, Asaph D. Leonard and Horace A. Chase, for \$215,71, which was docketed in the supreme court clerk's office at Geneva, on the said 25th day of September, 1840, at 2 o'clock P. M. and in the clerk's office of Cayuga county on the 28th day of September, 1840, at 8 o'clock A. M. By an order of the court of chancery, made on the 4th day of May, 1841, upon the petition of the bank commissioners, it was adjudged that the banking association called the Bank of Western New-York, Rochester, had violated the laws of this state binding on the said association, as stated in the petition; and had thereby forfeited its rights, franchises and privileges, and the appointment of a receiver was ordered, in pursuance of the act of the 27th of April, 1841, entitled "An act respecting the appointment of receivers of moneyed institutions;" and that a perpetual injunction issue, &c. By another order of the court of chancery, made on the 6th day of July, 1841, G. H. Mumford was appointed receiver of, &c. of the said association, under the said act. By an instrument in writing under seal, bearing date February 6, 1845, George H. Mumford as such receiver, for the consideration of twelve and a half cents, sold, assigned, transferred and set over the said last mentioned judgment to Ephraim B. Ellwood. The assignment recited that the sale of the judgment was made to Ellwood "at a sale of the assets of the Bank of Western New-York, Rochester, made by the receiver of said bank, at public auction, on the 5th day of February, 1845," and that the said judgment was offered for sale and was struck off to Ellwood for twelve and a half cents, he being the highest bidder therefor. By an indorsement upon the back of the said assignment, without date, the said Ephraim B. Ellwood, in consideration of \$5 in hand received, as expressed therein, sold his right and interest to the judgment mentioned in the first assignment to the plaintiff. On the 23d day of December, 1846, the plaintiff presented to and left with the defendant Carr, the following papers, with the declared object of acquiring the rights of the original purchaser of the prem-

Muir v. Leitch.

ises sold by him by virtue of the execution in favor of the defendant Leitch against Leonard to wit: 1st. A certified copy of the docket from the clerk's office in the supreme court, of the judgment in favor of Guernsey, president, &c. against Rob't Muir, Leonard and Chase. 2d. A certified copy of the docket of the same judgment in the office of the clerk of the county of Cayuga. 3d. A copy of the order of the court of chancery above mentioned, made on the 6th of July, 1841, being the second of the two above mentioned orders. 4th. A copy of the above mentioned assignment from Mumford, the receiver, to Ellwood, of the judgment in favor of Guernsey, president, &c. 5th. A copy of the assignment from Ellwood to the plaintiff of the same judgment. 6th. An affidavit of the plaintiff, made on the 24th of December, 1846, intended to be in conformity to the statute, and verifying the order of the court of chancery and the several assignments above mentioned, and stating the true sum due upon the judgment mentioned in the assignments. 7th. Another affidavit, made by the plaintiff, substantially like the first, but varying in form. In both the affidavits the amount due on the judgment was stated upon the belief of the plaintiff. At the time of presenting to and leaving with Carr the said papers, the plaintiff paid to him \$544 for the same purpose, claiming to redeem the premises from said sale.

After the above papers were left with the defendant Carr and the money paid him by the plaintiff as above stated, and on the same day, the defendant presented to and left with Carr the following papers, for the purpose of acquiring the rights of the original purchaser of said premises at said sale, viz. 1st. A certified copy of the docket of a judgment in the supreme court, in favor of Joseph S. Pitney against Asaph D. Leonard, Satterlee Warden, and Robert Muir, for \$1492,03, docketed in the clerk's office of the supreme court at Geneva, September 4th, 1840, at 4 o'clock P. M. 2d. Another copy of the docket of the same judgment in the same office, varying in form from the other. 3d. A copy of the docket of the same judgment in the clerk's office of Cayuga county, showing that the judgment was docketed in that office on the 7th day of September, 1840, at 8 $\frac{1}{2}$ A. M. 4th. A

Muir v. Leitch.

copy of an assignment of the last mentioned judgment by the said Joseph S. Pitney to the defendant Leitch, dated in December, 1840, for the consideration, as expressed in the assignment, of \$1500. 5th. An affidavit of the defendant Leitch, verifying the assignment to him of the last mentioned judgment, and stating the amount due at the time of making the affidavit to be \$2150.79. The defendant Leitch, at the same time and for the same purpose, paid the defendant Carr \$550. After these transactions, both parties, the plaintiff and the defendant Leitch, claimed a deed from the defendant Carr under the sale, as having acquired the interest of Worden, the purchaser at the sheriff's sale. In about a week afterwards, Carr executed a deed to Leitch, upon being indemnified by him for so doing.

The bill alledged, among other things, that soon after the judgment in favor of Pitney was rendered, and about the 5th of October, 1840, an execution was issued upon that judgment, against the goods and lands of the defendants therein, and delivered to Hiram Rathbun, then the sheriff of Cayuga county, who, by virtue thereof, levied upon sufficient personal property of Satterlee Warden, one of the defendants, to satisfy it. That after such levy, and some time in December, 1840, Leitch, at the request of Satterlee Warden and Leonard, or one of them, paid the amount due on the judgment to Pitney the plaintiff, and took an assignment of the judgment, and on or about the same time, Leitch received of said Warden his bond and mortgage, conditioned to pay said Leitch \$2500 with interest, one half in two, and the other half in three years, which mortgage was upon certain premises therein described, situated in the then village of Auburn, and was duly recorded in the office of the clerk of Cayuga county on the 24th of Dec. 1840. That the amount due on the Pitney judgment so assigned to Leitch was included in the bond and mortgage, and formed a part of the \$2500 thereby secured. That soon after the execution of the said bond and mortgage, Leitch, with the consent of Warden, took possession of the mortgaged premises, and had ever since continued in possession and in the receipt of the rents and profits thereof. The bill charged that the mortgaged premises were

Muir v. Leitch.

subject to the lien of the Pitney judgment, and to levy and sale under the execution issued thereon, and were worth much more than the whole amount due upon the judgment at the time the said execution was delivered to Sheriff Rathbun, and of the execution and delivery of the mortgage. The bill further alledged that after Leitch had become the owner of the Pitney judgment, and after he knew of the execution and levy thereon, he instructed Rathbun, the sheriff who held it, not to sell the property of Warden upon the execution, but to release the same from such levy ; and that said Rathbun, in consequence of such instructions, refrained from selling the property, and the same was left in the hands of Warden and used by him for his own benefit, with the knowledge and consent of Leitch. No personal claim was made in the bill against Carr, but the same was waived, except that he convey the premises sold to the plaintiff. The bill contained various other statements and charges as grounds of relief, not necessary to be stated, and prayed that the defendants might answer under oath ; that Carr might be directed to convey the premises in question to the plaintiff ; that the deed executed by Carr to Leitch might be decreed void and cancelled, and that Leitch be decreed to release to the plaintiff all the interest he might have acquired under his deed.

The answer of the defendant Leitch, among other things, denied any knowledge of any execution having been issued upon the Pitney judgment to Sheriff Rathbun as stated in the bill. The answer further denied that Rathbun the sheriff, by virtue of any execution issued upon the Pitney judgment, levied upon any personal property then belonging to Satterlee Warden, or in his possession, or upon any or sufficient personal property belonging to said Satterlee Warden, or either of the defendants in the Pitney judgment, to satisfy the same or any part thereof. The answer also denied that, at the time the defendant purchased and took the assignment of the Pitney judgment, any personal property of Satterlee Warden had been levied upon, or was subject to any levy, under an execution upon the judgment. In regard to the mortgage mentioned in the bill, given by Warden to Leitch for \$2500, the answer stated that about the time

Muir v. Leitch.

Leitch took the assignment of the Pitney judgment, he lent Warden \$1550, and Warden thereupon executed the mortgage to him for \$2500, and at the same time Leitch executed to Warden a writing, declaring the uses and purposes for which the mortgage was given, and which were, first, to secure the \$1550 lent and interest thereon, and second, to indemnify him against loss in consequence of his paying up and taking the assignment of the Pitney judgment, which was recovered upon a demand which, in law and equity, ought to have been paid by said Robert Muir and Asaph D. Leonard, the other defendants in the Pitney judgment, and upon which Warden was liable as surety for said Leonard and Muir. That the premises embraced in the mortgage were incumbered by two prior mortgages, amounting to rising of \$2100; one held and owned, at the time, by him the defendant, and the other held and owned by one Beach, and which the defendant had been since obliged to pay, to save his liens, &c. That none of the sums secured by said mortgages, or any part thereof, had been paid to the defendant, and that the mortgaged premises were a scanty and indifferent security for them. The answer admitted that Leitch had received the rents and profits of the mortgaged premises, but insisted that such rents and profits were insufficient to pay and keep down the interest of the several sums, to secure which the mortgages were held by him. The plaintiff put in a general replication.

The cause was brought to a hearing at a special term held in Cayuga county on the 17th of February, 1848, before Maynard, justice, at which time the proofs in the cause were taken, when the cause was ordered to the general term for hearing. The evidence, so far as it affects the decision, is referred to in the opinion of the court.

David Wright, for the plaintiff.

P. G. Clark, for the defendants.

Muir *v.* Leitch.

By the Court, WELLES, J. If the defendant Leitch acquired the rights of the purchaser, at the sheriff's sale of the premises in question, it will be unnecessary to consider the objections to the proceedings and papers of the plaintiff, in his attempt to accomplish the same end; for as the lien of the judgment in favor of Pitney, upon which the proceedings of the defendant Leitch are founded, was prior to that of the judgment held by the plaintiff, and by virtue of which he claims to have acquired such rights, the defendant was not bound to pay the amount due on the latter judgment, and will be entitled to hold his deed. (2 R. S. 372, § 55.)

1. The first point made by the plaintiff is that the Pitney judgment was satisfied by levy upon sufficient property of Satterlee Warden to satisfy it. On this subject it appears by the testimony of Hiram Rathbun, the former sheriff of Cayuga county, that he received the execution on the Pitney judgment on the 5th day of October, 1840, he being such sheriff at that time, and that he so continued until January 1st, 1842. That the execution has remained in his hands ever since. It was tested the 1st Monday of July, 1840, and returnable sixty days from its receipt by the sheriff. That within a very few days after he received the execution, and he thinks within one or two days after, he levied, by virtue of it, upon the following personal property, in possession of Satterlee Warden, viz. a large amount of household furniture in the dwelling house of Warden, being the whole thereof except what was exempt from sale on execution, one, and he thinks, two sorrel horses, a pleasure carriage on the premises of Warden, a large quantity of bran and shorts in possession of Warden in a shop in Auburn, called the Burr Block shop, and a large quantity of unground plaster or gypsum in possession of Warden in an open shed near the Stone Mill in Auburn. That he did not sell any of the said property, in consequence of being instructed not to do so, by the defendant Leitch, who informed him that he, Leitch, had satisfied the plaintiff Pitney, and that he, the witness, should retain the execution in his hands, but not enforce it against the personal property of Warden, which was not to be sold thereon, but that the

Muir *v.* Leitch.

witness should hold the execution subject to the orders of him, the said Leitch, who claimed to be the party in interest in the execution, having the control of it. It appears by other evidence in the case that the bran and shorts, and the gypsum, referred to by the witness Rathbun as having been levied on by him, was the property of the partnership firm of Warden & Muir, which firm was insolvent, and that the household furniture, and horse and carriage, did not exceed \$800 in value, and probably not over \$700, and if the value of bran and shorts and the plaster is added, it would not, upon a liberal allowance, amount in value to the principal sum of the Pitney judgment.

An attempt was made to prove, by the witness Robert Muir, that the Pitney judgment had been reduced by payments or otherwise, so that at the time of the proceedings of these parties with a view to acquire the rights of the purchaser at the sale of the premises in question, there was only four or five hundred dollars due upon it. Muir, the witness, testifies to conversations with the defendant Leitch, from which it would appear that such was the fact. But I am satisfied, from other evidence detailed in the case, that Mr. Muir misunderstood the defendant Leitch, or that his recollection has failed him ; and that the declarations he testifies to related to payments upon a judgment in the hands of Leitch, in favor of one Cephas Smith, against the said Asaph D. Leonard and others. If any part of the property levied upon by Sheriff Rathbun, by virtue of the execution issued upon the Pitney judgment, belonged to the firm of Warden & Muir, such property would not be liable for any indebtedness of Warden, except a partnership debt, until the debts of the firm were all paid ; and if the firm was insolvent, a purchaser under a sale in pursuance of such levy, would of course acquire no valuable interest in such property. And it follows that the bran and shorts, and the plaster, should be excluded from the estimate, in ascertaining whether the levy was upon sufficient property to satisfy the execution. (*Mathews v. Payne and others*, 6 *Paige*, 20. *Buchan v. Sumner*, 2 *Barb. Ch. Rep.* 197. *Taylor v. Fields*, 4 *Vesey*, 396. *Ex parte King*, 17 *Id.* 115. *Nicholl v. Mumford*, 4 *John. Ch. Rep.* 522. *Story on*

Muir v. Leitch.

Part. §§ 363, 364, 365. Story's Eq. Jur. § 675. Jackson v. Cornell, 1 Sandf. Ch. Rep. 348. 3 Kent's Com. 264, 265, 3d ed.)

It is therefore evident, from the testimony, that the levy was not upon *sufficient personal property to satisfy the execution*. And admitting the value of the property which was levied upon and which was applicable to this execution, to be deducted from the amount of the judgment, there remains a balance which would be a valid lien upon the real estate of Leonard, and which was sufficient to entitle him, under the statute, to acquire the rights of the purchaser at the sale, or to become the purchaser from another judgment creditor who had acquired such rights.

II. The plaintiff's next point is that the defendant Leitch suffered the execution on the Pitney judgment to lie in the sheriff's hands dormant, and that he can not resuscitate that judgment as against a sale upon a junior judgment. And that while that execution remained dormant, the lien of the judgment was also dormant. I do not think the authorities cited by the plaintiff, or any others that can be found, sustain the position assumed, that if the execution is dormant the judgment loses its lien upon the land of the defendant. Questions in regard to dormant executions, generally, and I believe invariably, arise between conflicting claimants of *personal property*. The doctrine on the subject does not apply to real estate, the lien upon which depends upon the docketing of the judgment and not upon the execution or levy. The lien upon the personal estate depends upon the issuing of the execution. If an execution creditor causes a levy to be made upon the goods of his debtor, and then directs the officer charged with the execution of the process not to proceed for a certain time, or until further orders, his conduct is a fraud upon a junior creditor, whose execution is levied afterwards, and before the directions of the first, to the officer, are countermanded; and in such case, the first execution will be adjudged dormant, and the second will have priority. In the case supposed, the effect of the conduct of the first creditor is to hinder and delay the other, and tie up the defendant's goods

Muir v. Leitch.

from other creditors. It is a prostitution of the process of the court, which is designed as a coercive proceeding by the plaintiff against the defendant, to compel payment, and not to prevent other creditors collecting their debts. None of this reasoning can apply to real estate. The lien of the judgment never becomes dormant until the expiration of the ten years statute limitation.

III. It is contended, in the third place, on the part of the plaintiff, that if the Pitney judgment was not dormant, then the premises in question were sold on that execution; the same being then in the hands of the sheriff of Cayuga county; and if so, then the lien of the judgment as to these premises was gone.

If the premises in question were sold upon the execution issued on the Pitney judgment, together with that in favor of the defendant Leitch, the lien of the former judgment upon those premises would be extinguished, although none of the proceeds of the sale would have been applicable to the execution, but were wholly exhausted by the other and older execution. (*Ex parte Paddock*, 4 *Hill*, 544.) But in this case there can be no pretence that the premises were, in fact, sold upon the execution issued on the Pitney judgment. The bill and answer both alledge the sale to have been on the Leitch judgment, and the proof establishes the same thing. The execution on the Pitney judgment was issued and delivered to Sheriff Rathbun in 1840, and the premises were sold in 1845 by another sheriff, who never had an execution, issued upon that judgment, in his hands, and could not have sold upon the one in the hands of Rathbun.

IV. Another point made by the plaintiff is that the defendant Leitch did not in his affidavit state the true sum due upon the Pitney judgment, and did not, in that respect, conform to the requirement of the statute. (2 *R. S.* 373, § 60, *sub. 3.*)

By this, I suppose, is meant that the amount stated in the affidavit to be the true amount due on the judgment was not actually due; or in other words, that the affidavit, though sufficient in form, and certain in this respect, is shown to be un-

Muir *v.* Leitch.

true in point of fact. If that is what is meant by the objection, I think it is founded upon a wrong construction of the statute. I do not think the statute requires that the amount stated in the affidavit shall be, at all events, the true amount. If the affidavit is made in good faith and is in proper form, it is all the statute requires. If the party opposing is able to show that nothing is due, he of course would destroy the lien of the judgment; but if he shows only that there is not as much due as the affidavit states, the lien is still good for the balance, and that balance is as effectual to entitle the party to acquire the rights of the original purchaser, or to become the purchaser from a former judgment creditor, as if the whole amount claimed were due. If in this case there was in fact but a small balance due on the Pitney judgment when Leitch made his affidavit, and he knew it, his swearing that the whole amount, with interest, was due, might be regarded as a fraud upon junior judgment creditors of Leonard, with a view to deter them from attempting to become purchasers from him under the statute. It would have a tendency to stifle competition among judgment creditors, amongst whom it is the policy of the statute to keep the door open for competition during the whole of the last three of the fifteen months succeeding the sale. In this case, however, whatever may have been the fact in regard to the actual amount due, I am unable to discover any ground for an imputation upon Leitch of wilfully misrepresenting the fact, in his affidavit. I am prepared to go further, and to say that the evidence entirely fails in showing that any thing whatever has been paid to Leitch upon the judgment in question; and that if the amount sworn to is no more than the principal of the judgment, with the interest accurately computed thereon, the affidavit in that respect was literally true.

V. The plaintiff's fifth point is that the defendant Leitch, by his agreement with Satterlee Warden, (one of the judgment debtors,) at the time he took the assignment of the Pitney judgment, whereby he postponed the time of payment of the amount due thereon, thereby postponed the lien thereof, and destroyed the same as against other judgments then existing.

Muir v. Leitch.

I am not prepared to subscribe to this doctrine. As well might it be said that if a plaintiff in a judgment stipulates with the defendant not to issue execution for one year, or any longer or shorter period, the lien of the judgment is thereby suspended or postponed. The statute which limits the duration of the lien of a judgment to ten years from the time of docketing, I think in effect settles this question. I believe it has never been held or understood by the courts that the lien of a judgment is affected by the plaintiff binding himself not to take out execution for any stipulated time less than ten years.

VI. The plaintiff contends, in the sixth place, that the receiving a mortgage for the same debt, payable at a distant day, was in fact and in law a release of the mortgaged property from that execution, and also from the judgment, as no part thereof could be sold thereon.

The counsel for the plaintiff, in support of this point, relies upon 2 R. S. 368, §§ 31, 32. *Delaplaine v. Hitchcock*, (6 Hill, 14,) and *Patterson v. Cummin*, (2 Penn. R. 32.)

The statute referred to is respecting the case of a judgment recovered for a debt secured by mortgage of real estate, declaring it unlawful for the sheriff to sell the equity of redemption of the mortgagor, &c. in such estate by virtue of any execution upon such judgment, and directing the plaintiff's attorney in such case, to indorse upon the execution a brief description of the mortgaged premises, &c. and a direction to the sheriff not to levy the execution upon such premises, or any part thereof. It is sufficient to say that this case is not within the letter, spirit, or equity of the statute, which was designed to apply to the ordinary case of a debt secured by bond and mortgage, and to confine the creditor's remedy upon the land mortgaged, to the mortgage alone. It certainly could never have been intended to destroy the lien of a judgment to be recovered upon the bond or other security accompanying the mortgage, upon lands other than the mortgaged premises. Admitting in this case, that by the operation of the mortgage which Warden gave to Leitch, the lien of the Pitney judgment upon the mortgaged premises was destroyed, it does not follow, as I can perceive, that

Muir v. Leitch.

its lien upon other lands belonging to another party defendant, is also destroyed.

The case of *Delaplaine v. Hitchcock* was precisely within the letter of the statute, and my only surprise is that any respectable lawyer could have supposed there was any question in that case to present to the court. It certainly bears no analogy to the present. The case referred to in 2d Pennsylvania Reports, I have not been able to find, but from a short note of it in 2d U. S. Dig. p. 52, § 277, I am inclined to think it was decided under some statute of that state. The note is as follows: "Under directions given by a party or his attorney, to the sheriff, not to consider his judgment, in holding an inquisition of a debtor's lands, the judgment is postponed to all others then in existence against the debtor." If it has any bearing upon the present case, I confess I have been unable to discover it.

VII. The only remaining objection of the plaintiff to the defendant's proceeding is that the defendant Leitch has other securities for the moneys paid by him for the Pitney judgment, and is not in equity entitled to redeem.

The other security referred to is the mortgage of Warden, for \$2500, bearing date 22d December, 1840. That was given to secure \$1550 lent by Leitch to Warden at the time, and for the further purpose of indemnifying Leitch against loss for paying up and taking an assignment of the Pitney judgment. The land mortgaged was at the time encumbered by two prior mortgages, one of which was to Leitch for about \$1500, and the other to Beach, upon which Leitch was obliged afterwards to pay between five and six hundred dollars to save and protect the lien of the mortgage for \$2500. The land is proved to have been worth, at the date of the latter mortgage, from \$3000 to \$3500. Taking the medium (\$3250) as the value and the \$1550 lent, and the prior incumbrances estimated at \$2050, more than exhaust the value of the land, leaving nothing in this mortgage to operate by way of security for the Pitney judgment. So that viewing the subject in this light the equitable force of the point vanishes. The mortgage, so far as it could be regarded as security for the Pitney judgment, was collateral,

Swarthout v. Swarthout.

and if it could be collected without resorting to the mortgage, it was Leitch's duty to do it; for if the evidence of Satterlee Warden is to be relied upon, the judgment belonged equitably to Robert Muir to pay, and as between Warden and Leonard, only one-half belonged to Warden to pay.

I am not prepared to hold that the fact of a judgment creditor having other security for the debt, besides the judgment, in and of itself disqualifies the judgment from being the foundation of the creditor's right under the statute to redeem. Whatever equities may attach in particular cases arising out of such considerations, it is sufficient that none exists in this case which ought to affect the defendant Leitch.

Upon the whole, I think the defendant Leitch was entitled to the deed upon the sale, which has been executed and delivered to him by the defendant Carr.

The bill must therefore be dismissed, with costs to the defendants to be taxed.

Decree accordingly

SAME TERM. Before the same Justices.

ELIJAH H. SWARTHOUT and others vs. JAMES SWARTHOUT and others.

An order was made by the court of chancery, appointing M. guardian for certain infants, to take charge of their property and estate, and authorizing such guardian to release, discharge, and cancel a bond and mortgage belonging to them, "upon receiving from J. S. a bond and mortgage upon unincumbered real estate of sufficient value to be ample security," &c. Held, that by this order the power to discharge the bond and mortgage was connected with a condition precedent that the moneys should be first secured upon other property; and that the guardian had no right to discharge the bond and mortgage without first receiving the security mentioned in the order.

Held also that, by the order of the court, the guardian was constituted a special agent, as respected the discharging of the bond and mortgage, with limited and

Swarthout *v.* Swarthout.

conditional powers ; and that unless his powers were strictly pursued, his acts were not binding upon his principals, the infants.

Held further, that the recording of a discharge, executed by such guardian without his having taken any new security, afforded no protection to subsequent mortgagees ; especially where such discharge, on its face, did not show that the security had been given, as required by the order, but on the contrary recited that the money had been paid to the guardian, on the bond and mortgage. Under such circumstances subsequent mortgagees, seeking a protection under the registry act, are bound to show that the guardian was properly appointed, and had power to discharge the mortgage, and that his limited powers had been strictly pursued, before the infants can be prejudiced by his acts.

IN EQUITY. This cause was first heard at a special term held before Hoyt, justice, at Canandaigua, in September, 1847, upon pleadings and proofs. After advisement, Justice Hoyt directed a decree for the plaintiffs, upon which he delivered an opinion which contains the facts of the case, sufficient for the understanding of the opinion by this court, as follows :

"HOYT, J. In 1829, James Swarthout was indebted to his father-in-law, Joseph Hunt, in a considerable sum, for which Hunt held the sealed notes of Swarthout. These notes were deposited by Hunt in the hands of Hon. John Maynard, to be prosecuted unless paid or secured, and with directions to Mr. Maynard to accept a bond and a mortgage on Swarthout's farm, payable to Swarthout's children, in equal amounts, as they should respectively become of age. A suit was afterwards commenced upon the notes, by Mr. Maynard, and on the 16th day of November, 1829, it was settled by giving the bond and mortgage required by Mr. Hunt. The bond and mortgage were executed by James Swarthout to his children, Joseph, Barna, Coe, Elijah, Selah, Deborah, Letitia, Mary, and Nancy, all infants, and conditioned to pay each of them the sum of \$768, when they should respectively arrive at 21 years of age. The bond and mortgage were left in the hands of Mr. Maynard, and the mortgage was recorded in Seneca county clerk's office, January 22, 1830. On the 11th of August, 1831, James Swarthout and wife conveyed 1 1-2 acres of the mortgaged premises to Jonas S. Larawa, and on the 30th April, 1835, Larawa, conveyed the same premises to the defendant John Neal. On the

Swarthout v. Swarthout.

14th day of August, 1837, a petition was presented to the vice chancellor of the sixth circuit, signed by the said James Swarthout, Coe Swarthout, Elijah Swarthout, and Selah Swarthout, setting forth that Coe was 19 years old, December 20, 1836; Elijah 18, the 19th August, 1837; Selah 16, July 2, 1837; and that Deborah Swarthout was 14 years old August 4, 1837; Letitia 13, the 13th September, 1837; Mary 11, the 22d January, 1837; and that Nancy was 10 years old the 9th April, 1837. The petition also set forth the rights of said infants to said bond and mortgage, and that they would severally be entitled to the sums thereby secured to them as they should respectively arrive at 21 years of age, and that said Elijah Swarthout was entitled to the further sum of \$1000, as a legacy bequeathed to him by the said Joseph Hunt, and to \$100 left him by an uncle in New-York, and that said infants had no other real or personal estate. The petition also set forth that the bond and mortgage had been left with Mr. Maynard, and that the petitioners understood and believed he contemplated removing to the west, and wanted to be rid of the trust as depositary of the bond and mortgage. The petition also set forth that James Swarthout had made sale of his farm upon which said mortgage was a lien, in Ovid, and had agreed to make a clear title thereto; and that he had purchased other property in Ulysses, and was desirous of having the said mortgage on the Ovid farm cancelled, and to secure the payments to his children on other property. The petition then prayed that a guardian might be appointed to take charge of the property and estate of the petitioners, Coe, Elijah, and Selah Swarthout, and also of the said infants Deborah, Letitia, Mary and Nancy Swarthout, and named John M. Miller as such guardian, and proposed James Swarthout and Charles E. Goodwin as his sureties.

The petition was sworn to on the 2d day of August, 1837, by James, Coe, and Selah Swarthout, and on the 7th of August, 1837, by Elijah Swarthout, and on the 9th of August, 1837, was presented to, and the certificate of Charles Humphrey, master in chancery, was procured thereto, of the truth of the facts stated in the petition, that Miller was a suitable person to be guar-

Swarthout v. Swarthout.

dian, and of the sufficiency of the sureties proposed, and the amounts in which they should give bonds.

On the presentation of the petition and certificate of the master to the court, on the said 14th day of August, 1837, an order was made by the vice chancellor, which, after reciting all the facts stated in the said petition and the certificate of the master, concluded as follows: "It is thereupon, on motion of H. S. Walbridge, solicitor for the petitioners, ordered that the said John M. Miller be, and he is hereby, appointed guardian for the said infants, for the purpose in said petition and hereinafter mentioned, upon the recording and filing with the clerk of the court for the sixth circuit the security mentioned in the said petition, and in the amount set forth in the certificate of the said master, conditioned for the faithful performance of the trust reposed in the said guardian, and for paying over and reinvesting and accounting for, all moneys that shall be received by him according to the order of any court having authority to give directions in the premises, and to observe the orders and directions of this court in relation to the said trust, such securities to be approved of by said master as to their form and execution, to be signified by his certificates indorsed thereon; and it is further ordered that the said guardian be, and he is hereby authorized to release, discharge and cancel the said bond and mortgage mentioned in the said petition, upon receiving from said James Swarthout a bond and mortgage upon unencumbered real estate of sufficient value to be ample security for the amount due to the said infants, conditioned to pay to each of the said infants the amount due to them respectively at the time they shall respectively become of the age of 21 years. And the said guardian is hereby required to make a report to this court as soon as conveniently may be, of his proceedings in the premises."

The bonds required by the order were executed, approved and filed in the office of the clerk of the sixth circuit, on the 23d day of August, 1837, and on the same day, Miller, the guardian, executed a satisfaction piece of the mortgage, which was on the same day acknowledged and recorded. This satisfaction piece certified "that the sum of \$768 secured to each of said infants

Swarthout *v.* Swarthout.

on their arriving at the age of 21 years respectively, in and by said mortgage, (describing it,) had been paid and satisfied to him as guardian of said infants, that is to say, the sum of \$768 had been paid to him as such guardian, for each of said infants, making in all the sum of \$5,376, and that the condition of said mortgage, so far as the interest of the said infants was concerned therein, had been performed, and the said mortgage discharged and satisfied."

There was no proof to show that any new security was taken by the guardian, for the money secured by said bond and mortgage, as was required by the order appointing him such guardian; or that any part of the mortgage money was in fact paid when the satisfaction piece was executed; or that it has been since paid or secured. And from all the circumstances of the case, it is highly probable that no security has been given, and that nothing has been paid. The sureties of the guardian, and the guardian himself, have all become insolvent, and the guardian is dead.

After the execution of the satisfaction piece, and on the 30th day of January, 1838, James Swarthout executed a mortgage to Charles Jackson on part of the premises, including other land, to secure the sum of \$2500 in two years. On the 15th of July, 1838, Swarthout executed a mortgage of \$8500 to one Reuben D. Dodge, on the premises described in the first mortgage. This mortgage was afterwards assigned to the North American Trust and Banking Company. There is no evidence showing that this mortgage was given to Dodge upon any valid consideration as between him and Swarthout. On the contrary, I think, from all the circumstances of the case, it was made for the purpose of being sold to raise money upon, or to be used to procure the stock of the North American Trust and Banking Company, and the stock to be sold to raise money by Swarthout.

The receivers and trustees of the North American Trust and Banking Company claim that they are *bona fide* purchasers of this mortgage, and that they are entitled to be protected as such, as against the complainants' mortgage, because such mortgage

Swarthout v. Swarthout.

had been discharged of record by the guardian of the plaintiffs. The purchasers of the land under the mortgage given to Jackson, make a like claim. Both of these mortgages have been foreclosed, but the plaintiffs were none of them made parties to such foreclosure.

The court of chancery has the care, custody and protection of infants and their estates, and has power to appoint guardians thereof, and to require from such guardians suitable and proper security for the trust reposed in them; and there can be no doubt that the court may restrict the guardians in their powers, and in the management and disposition of the property and effects of an infant. In this case the infants, with the exception of Elijah Swarthout, had no property except their respective interests in the bond and mortgage given them, no part of which was, by its terms, payable until they should respectively arrive at the age of 21 years, and the bond and mortgage was not upon interest. This bond and mortgage was well secured, and there was in fact no necessity or propriety in appointing a guardian to take charge of the estate of these infants, unless it was of the estate of Elijah Swarthout; and no guardian of the persons of the infants was appointed. The whole object of the proceedings seems to have been to enable James Swarthout to procure this mortgage to be discharged of record; and as he was the principal actor and moving party in the proceedings, and interested to procure its discharge, it was doubtless proper that the vice chancellor should scrutinize the proceedings with caution, and that he should require ample and sufficient security that the rights of the infants in the bond and mortgage should not be prejudiced. The petition asking for the appointment of Miller as guardian, also asked to have this bond and mortgage discharged by the guardian to be appointed, on his receiving security upon other unincumbered real estate. The order making the appointment, it will be observed, directed "that upon executing and filing the bonds therein required, Miller be appointed guardian for said infants, for the purpose in said petition and thereinafter in said order specified, which was that he be authorized to release and discharge and cancel the

Swarthout *v.* Swarthout.

said bond and mortgage mentioned in the petition, upon receiving from James Swarthout a bond and mortgage upon unincumbered real estate, of sufficient value to be ample security for the amount due the said infants," &c.

I think the fair construction of this order is, that the vice chancellor, in the appointment of the guardian, did not intend to give the guardian unlimited power in regard to this bond and mortgage; on the contrary, that he intended to restrict his powers in relation thereto, and to prevent his discharging them without receiving security as therein specified, and that the guardian had no power to discharge the bond and mortgage without receiving such security.

The mortgage having been properly recorded in the office of the clerk of the county, the record of it was notice to purchasers of its existence, unless the record of its discharge exonerated them from further inquiry. The mortgage having been discharged by a person other than the mortgagees, and by one claiming to be their guardian, the subsequent mortgagees are bound to make out that he had power to discharge the mortgage, before the plaintiffs can be prejudiced by his acts. The subsequent mortgagees were, therefore, bound to ascertain whether Miller was appointed a guardian with power sufficient to discharge the mortgage. And on looking at the order appointing him such guardian, the same order would show that he had no power to discharge the mortgage, except upon receiving another mortgage on other unincumbered real estate, of sufficient value to be ample security. And it was their duty to ascertain whether this had been done, before giving credit to the discharge. The discharge, on the face of it, did not show that the security had been given; on the contrary, it recited that the money had been paid to him on the bond and mortgage.

Judge Story, in *Story's Equity Jurisprudence*, § 400, says: "An illustration of the doctrine of constructive notice is, when the party has possession or knowledge of a deed under which he claims his title, and it recites another deed, which shows title in some other person; then the court will presume him to

Swarthout v. Swarthout.

have notice of the contents of the latter deed, and will not permit him to disprove it. And generally it may be stated as a rule on this subject, that when a purchaser can not make out a title but by deed which leads him to another fact, he shall be presumed to have knowledge of that fact. So the purchaser is, in like manner, supposed to have knowledge of the instrument under which the party with whom he contracts as executor or trustee, or appointee, derives his power. Indeed, the doctrine is still broader; for whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons, is in equity held to be good notice to bind him.) (*See Deming v. Smith, 3 John. C. R. 344.*)

There can be no doubt that these plaintiffs are entitled to have their bond and mortgage reinstated, and a decree declaring it a valid security as against the debtor James Swarthout. And this mortgage being prior in point of time to the claims of the other defendants, the plaintiffs are entitled to have a decree as against them; unless they can be protected under the provisions of the registry acts. (*Story's Eq. Juris. §1502. But see 7 John. C. R. 150.*)

And inasmuch as the guardian's powers in reference to this bond and mortgage were limited and restricted by the order appointing him, I think the defendants who seek a protection under the registry of the discharge of this mortgage, are to be required to establish: First. That Miller was properly appointed guardian. Second. That his limited powers had been strictly pursued, and that the security required by the order appointing him, to be given before he was at liberty to discharge the mortgage, had in fact been given. This latter fact not having been shown on the part of the defendants, they are not entitled to protection under the registry acts. There are several other questions raised on the part of the plaintiffs, which it will not now be necessary for me to examine.

A decree must be entered in this cause setting aside the satisfaction piece executed by James M. Miller as guardian of the plaintiffs and others, and declaring the bond and mortgage described in the bill as having been executed by James Swarthout

Swarthout v. Swarthout.

to the plaintiffs and others, to be as valid and subsisting a lien upon the mortgaged premises, so far as the rights of the plaintiffs and Coe Swarthout are concerned, as if such discharge had not been executed. And that the claims of the other defendants to the mortgaged premises are subsequent and subject to such lien, and directing a reference to the county judge of Seneca county to compute and ascertain the amount due and to become due to each of the plaintiffs on the said bond and mortgage, and also to compute and ascertain the amount due thereon to the defendant Coe Swarthout. The other defendants are to be at liberty to show, before the referee, and have allowed, any payments which may have been made to either of the plaintiffs, or to Coe Swarthout, since they respectively arrived of age, which ought to be applied upon their respective shares in the bond and mortgage, and apply the same thereon. But the referee is not to allow anything for expenditures by James Swarthout in the support or education of his children while under age. And the decree is to contain the usual provisions for a foreclosure and sale of the mortgaged premises for the amount found due to the plaintiffs and Coe Swarthout, upon such reference, and for plaintiffs' costs, and for the payment, by James Swarthout, of the deficiency, if any, after such sale.

The mortgaged premises to be sold in parcels, and in the inverse order of alienation; that portion mortgaged to Dodge, (and not embraced in the mortgage to Charles A. Jackson, or the deed to Jonas S. Larawa,) to be first sold. If that is insufficient, then the portion mortgaged to Jackson to be sold; and lastly, that deeded to Larawa, if necessary."

A decree having been entered in pursuance of this opinion, a rehearing was granted at the instance of some of the defendants, which was brought to argument at the Cayuga general term in March, 1849.

W. Curtis Noyes, for the trustees and special and general receivers of the N. A. Tr. and Banking Co.

T. R. Strong, for the Chemung Canal Bank.

Swarthout *v.* Swarthout.

S. B. Batchford & S. A. Goodwin, for plaintiffs.

The opinion of the court at general term was delivered by

WELLES, J. The mortgage given by the defendant James Swarthout, to the plaintiffs and Joseph H. Swarthout, Barna Swarthout and Coe Swarthout, dated December 16, 1829, was, in my opinion, well executed and delivered, and was a valid security for the benefit of the mortgagees. It was given to secure money borrowed by the mortgagor, of Hunt, the plaintiff's grandfather, and the note given by the mortgagor to Mr. Hunt for the money, was given up to be cancelled upon the execution of the bond and mortgage. The taking of the bond and mortgage to the grandchildren constituted a valid gift to them of the amount secured to them respectively, upon their coming of age. The more important question is whether the satisfaction of the mortgage by Miller, as guardian of the mortgagees, was valid and effectual.

The petition presented to the vice chancellor of the 6th circuit assigned two reasons for his appointment; 1st, that John Maynard, with whom the bond and mortgage were left, contemplated removing to the west, and was desirous of being rid of his trust as depositary of the bond and mortgage; 2d, that James Swarthout had made sale of the mortgaged premises and had agreed to make a clear title to the purchaser, and wished to have the mortgage removed and cancelled, and the moneys secured on other property which he had purchased. The petition prayed for the appointment of a guardian to take charge of the property and estate of the infant petitioners. The order appointed Miller guardian for the infants, for the purposes in the petition and thereafter in said order mentioned, upon his giving the required security. The order then proceeds as follows: "And it is further ordered that the said guardian be, and he is hereby authorized to release, discharge and cancel the said bond and mortgage mentioned in the said petition, upon receiving from the said James Swarthout a bond and mortgage upon unencumbered real estate of sufficient value to be ample security for the

Swarthout v. Swarthout.

amount due to the said infants, conditioned to pay to each of said infants, &c. And the order required the guardian to make a report of his proceedings, &c.

These proceedings before the vice chancellor, to say the least, are very strange and unusual. If it were true that Mr. Maynard contemplated removing to the western states, it might be a reason for appointing a general guardian for the infants, for the single purpose of being the holder or depositary of the securities belonging to the infants. No other good reason for even that measure was alledged in the petition. It is unaccountable that some reference was not made to Mr. Maynard, to ascertain whether he desired to have some one, besides himself, take and hold possession of the bond and mortgage, or that some prudential reason existed for having the possession of them changed. He was the individual selected by the author of this bounty to his grandchildren, as a fit and proper person to have the custody of the securities which he had caused to be taken. It turns out that the idea that it was necessary to have a guardian appointed for that purpose was trumped up in order to fortify the application and to give the proceeding a semblance of propriety, and for the purpose of securing what we can not fail to see was the leading, if not the only object, to wit, the satisfaction and discharge of the mortgage. Mr. Maynard swears that he has no recollection of ever having expressed a desire to deliver up the mortgage in consequence of a purpose of removing to the west, for the reason that he never had come to any fixed determination of so removing, although he did, at one time, talk of doing so. If the order had gone no farther than to provide a custodian of these securities, it would perhaps have been well enough. That part of it which authorizes the cancellation and discharge of the mortgage of record is the most remarkable. This gift of Mr. Hunt to his grandchildren was securely and most judiciously invested under his own direction. The objects of his bounty, as he had a right to suppose, were all safely secured upon their respectively arriving at the age of twenty-one, in the receipt of their respective shares, and the effect of this proceeding, even if the directions of the order had in all respects been complied with,

Swarthout *v.* Swarthout.

was to disturb the arrangement and render the security less satisfactory ; at least to leave its sufficiency to the discretion of the guardian. The mortgage was upon rising of 300 acres of unincumbered land in Seneca county, the title to which was unquestionable, estimated in 1838 to be worth \$60 an acre, over and above the buildings. The aggregate amount secured by the mortgage was \$6912. This most abundant security to these infants was, by this order, to be released upon the guardian taking security on other real estate. True, the order provided that the new security should be ample, but who was to be the judge of its sufficiency ? The court did not even reserve the power of deciding. I do not regard it a sufficient answer that the guardian was required to give bonds, as mentioned in the order. In case he had taken the security as contemplated, and that had been injudicious, and had turned out, for any reason, insufficient or even worthless, the obligors would not have been liable unless in case of bad faith or gross carelessness on the part of the guardian. Besides ; the security given by the guardian was only personal, which, in this changing world, is found to be very uncertain when it is to run for a series of years, whatever appearances, or the actual state of things, may be at the time it is taken ; as this case fully illustrates.

The great objection to the proceeding is, that in no possible aspect could it have benefited the infants, and was solely for the benefit of other persons ; and that its only effect upon the infants would be to put their interests in jeopardy. It may be that the court of chancery had the power to make the order in the shape we find it. If it had, it was a power inherent in the court *as parens patria* in the care and management of infants—and not by virtue of any statutory provision. It will be unnecessary here to discuss the question of jurisdiction ; as the view I am about to take will supersede it. If the order, authorizing the guardian to discharge the mortgage, was within the jurisdiction of the court of chancery, and for the purposes of this case I shall assume that it was, then its propriety can not be here assailed, whatever may be the consequences to the plaintiffs. But if the power conferred upon the guardian to discharge the mortgage

Swarthout v. Swarthout.

was conditional, the performance of the condition was essential to the validity of the exercise of the power.

The order authorizes the guardian to release, discharge and cancel the bond and mortgage, upon receiving from James Swarthout a bond and mortgage upon unencumbered real estate, &c. It seems to me that it can not admit of a doubt that before the guardian could have any power to act under this provision, he must have received the bond and mortgage, according to the directions of the order. It is averred in the bill that the new security, contemplated in the order, was never taken, and there is no proof in the case that it was. If it was not taken, it follows inevitably that Miller, in assuming to discharge the mortgage, acted without authority, unless he possessed the requisite power independent of the particular provision which assumes to confer it. If so, it was by virtue of his general powers as general guardian.

Admitting that as general guardian he could discharge this mortgage, provided the order had been silent in relation to it, and had given no directions on the subject, I think the fact that the order gives special directions in relation to the power in question, amounts to a restriction of the power; and that the fair and reasonable construction of the order is, that the power to discharge the mortgage was connected with a condition precedent, that the moneys should be first secured upon other property, according to the provisions of the order, before the guardian would be authorized to discharge the mortgage. This construction, I think, derives support from the consideration that the leading and principal object of the proceeding before the vice chancellor was the cancellation of the mortgage. And in making an order to effectuate that object, the court required the taking of other security before the mortgage should be discharged. The guardian in this case was constituted a special agent as respected the discharging of this mortgage, with limited and conditional powers; and his acts were not binding upon the infants, who in this respect were his principals, unless his powers were strictly pursued.

With respect to the question whether the condition was per-

Swarthout *v.* Swarthout.

formed, it is claimed that the trust of a guardian is an office, and that in the absence of proof to the contrary it will be presumed that he has done his duty and taken the security required by the order. I doubt very much whether the rule of presumption referred to ever applies to a case like the present. The guardian is a mere trustee, and in my opinion neither he nor those claiming under him, or claiming a benefit from his acts, has any right to protection under the rule. That where the validity of his acts depends upon the performance of a condition precedent, it must be proved, as much as in any other case. To hold that upon this question the burthen of proof was upon the plaintiffs, would be virtually a denial of justice. How would it be possible for them to prove affirmatively that the security was not taken? The order did not restrict the guardian as to the place where the land should be situated upon which the new security was to be taken; not even to the state or territory—while if it was taken, it was a fact which might easily be shown, or might have been ascertained at the time the subsequent conveyances and incumbrances by Swarthout were made.

Again; the discharge, as well remarked by Mr. Justice Hoyt, in his opinion in this case, on its face did not show that the security had been taken. On the contrary, it recited that the money had been paid to Miller on the bond and mortgage. The payment of the money was not a compliance with the order. He had no right to receive the money and discharge the mortgage. It would have been breaking up the investment made by Hunt for his grandchildren, and defeating his benevolent purposes, and was not the intention of the court in making the order. But I apprehend it is not seriously contended that any money was in fact received by Miller as guardian. The idea would contradict the whole history of the case. The certificate of the clerk of Seneca county can not help the defendants. Upon a proper search being made, this mortgage would be found. It would be seen also that the satisfaction was by a person other than the mortgagee. Common prudence would lead to an inquiry as to his authority to satisfy it. The person making the

Stone *v.* Miller.

search would see that in making the certificate of satisfaction, Miller acted as guardian of the infants, and would be bound at his peril, to see that he was duly appointed guardian by a court or officer having power to make the appointment. If he could not find out who appointed him, he should presume he was a usurper, and acted without authority. If he found the order of appointment, he would then have full notice of the condition of the authority to release the mortgage, and would be bound to know that the law adjudged the satisfaction void unless the other security was taken.

The certificate of a county clerk respecting title and incumbrances is generally regarded reliable evidence of the facts it contains. Its value, however, depends upon the accuracy and faithfulness of the officer, and is binding on no one.

Upon the whole, I am satisfied with the decree made by Justice Hoyt at the special term, and think it should be affirmed, with costs.

Decree affirmed.

SAME TERM. *Johnson, Welles, and Selden, Justices.*

STONE *vs.* MILLER.

A plea in bar, containing matter in abatement, is bad on general demurrer. A plea alledging the pendency of a former suit, commenced by the defendant against the plaintiff, in a *plea of trespass on the case*, in which the present plaintiff had set off the same identical demand sued on, in the second suit, is demurrable.

ERROR from Wayne county court. The cause was originally tried before a justice of the peace. Miller, the plaintiff before the justice, declared against Stone in assumpsit for work, labor and services performed by the plaintiff's son, who was a

Stone v. Miller.

minor at the time, and for goods sold, &c. and for money had and received, &c. The defendant pleaded 1st. the general issue, and 2d. the pendency of a former suit before another justice, commenced by Stone against Miller, *in a plea of trespass on the case*. That issue was joined in that suit, which issue was pending and undetermined at the time of putting in this plea ; averring that in that suit the plaintiff set off against the demand of the defendant the same identical cause of action set forth in this action ; which action remained to be determined. The plaintiff demurred specially to the second plea, and the justice sustained the demurrer.

In a supplemental return, the justice stated that he was unable to set forth all the reasons assigned by the plaintiff as causes of demurrer, but among them was the following : "The plaintiff objected to the dilatory plea, saying that it was too late after the general issue, and I so understood the law, and sustained the plaintiff's objection to such dilatory plea." The justice rendered judgment for the plaintiff for \$25, which the county court affirmed. This writ of error was brought to reverse the judgment of the county court and that of the justice.

T. R. Strong, for the plaintiff in error.

John W. Cary, for the defendant in error.

By the Court, WELLES, J. The judgment of the county court should be affirmed.

1st. The plea upon which the question arises was of matter in abatement, and was bad on general demurrer, as a plea in bar. It was nevertheless pleaded in bar.

2d. The first suit was an action of trespass on the case. This does not necessarily mean an action in which a set-off was admissible. It may have been trover or for fraud, or any other action on the case not including an action on a contract. Indeed an action on the case is not understood to include assumpsit, debt, or covenant, which are about the only actions

Childs *v.* Hart.

sounding in contract, triable before a justice. If it was not founded upon a contract, a set-off would be inadmissible if objected to.

Judgment affirmed.

•••

SAME TERM. *Before the same Justices.*

CHILD'S *vs.* HART.

A declaration in replevin, in the *cepit*, must show a wrongful taking. But it is sufficient to alledge that the defendant took the property of the plaintiff, and unjustly detains the same. Such an allegation imports a tortious taking. *Reynolds v. Lounsbury*, (6 Hill, 534,) distinguished from the present case; and the remark of Bronson, J. that "the plaintiff should have alledged that the defendant wrongfully took the property" disapproved.

DEMURRER to declaration. The declaration was in replevin in the *cepit*. It stated that George Hart was summoned to answer Jonathan Childs of a plea wherefore he took one piano then in the house occupied by Washington Gibbons, in the city of Rochester, of the said Jonathan Childs, and unjustly detained the same against sureties and pledges, until, &c. and thereupon the said Jonathan Childs complained, for that the said George Hart, the defendant, on the first day of April, 1848, at the city of Rochester, in a certain dwelling house then occupied by one Washington Gibbons, took one piano of him the said plaintiff, of great value, to wit, the value of one thousand dollars, and unjustly detained the same against sureties and pledges until, &c. wherefore, &c. The defendant demurred to the declaration and assigned for cause, among other things, "that it does not appear in and by the said plaintiff's declaration, whether the taking therein complained of was a legal or a tortious taking. There were other special causes assigned, but no point was made of them upon the argument.

Childs v. Hart.

H. Humphrey, for the defendant.

E. Darwin Smith, for the plaintiff.

By the Court, WELLES, J. It is supposed that the precise question involved in this demurrer was decided against the present plaintiff in the case of *Reynolds v. Lounsbury*, (6 *Hill*, 534.) In that case the declaration was similar in its form to the present. The objection was not taken until after the defendant had pleaded over, and the cause had been moved on to trial. The case came before the late supreme court on a writ of error, and the objection was there overruled, upon the ground that the defendant should have demurred to the declaration, and that although the defect appeared upon the record, it was cured by the verdict. Bronson, Justice, in delivering the opinion of the court, remarks that "the plaintiff should have alledged that the defendant wrongfully took the property." The title of the revised statutes, on the subject of replevin, provides that "whenever any goods or chattels shall have been wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, an action of replevin may be brought for the recovery thereof, and for the recovery of the damages sustained by reason of such unjust caption or detention, except in the cases herein-after specified." (1 *R. S.* 522, § 1.) The action is not enlarged by the statute so as to extend to a greater or different class of cases than it embraced before; excepting that it will now lie for an unjust detention of goods where they came lawfully into the defendant's possession. The form of the declaration in this case is according to all the approved precedents, and the statute referred to does not assume to direct the form of the declaration, or of any of the pleadings in the action, excepting in the case of a wrongful detention merely; in which case it provides that the declaration must conform to the writ, and adds "and where the action is founded upon the wrongful taking and detention of the property, but such property for any reason shall not have been replevied and delivered to the plaintiff, the declaration shall not only alledge such wrongful taking, but shall also

Childs v. Hart.

allege that the defendant continues to detain such property." (§ 36.) The 6th section gives the form of the writ in each case, which form commences as follows: "Whereas A. B. complains that C. D. has taken and does unjustly detain (or 'does unjustly detain,' as the case may be) one horse," &c.

There is no doubt but the declaration must show a wrongful taking. This was always so, and I think it clear that this declaration shows such taking. If it does not, then all the forms, ancient and modern, have been wrong. It is no more necessary, under the statute, than it was at common law, to show a wrongful taking. The taking must have been wrongful, at common law, in order to sustain the action; and the language employed by the pleader in the present case, was always understood to import such wrongful taking. The plaintiff here alleges that the defendant took his property. If a man takes my property, *prima facie* it is an unlawful taking, and if unlawful, it is wrongful.

With respect to the remarks of Justice Bronson in *Reynolds v. Lounsbury*, (*supra*), it was unnecessary to the decision of that case. The decision was put upon the ground that the objection to the declaration came too late, and that the alledged defect was cured by the verdict. The question whether the objection to the declaration, if properly taken, upon demurrer, would have been good, does not seem to have received much consideration, and the remark of the learned justice, if not entirely *obiter*, was, I think, unguarded. I do not think he would himself, upon reflection, sanction it.

The plaintiff is entitled to judgment upon the demurster, with leave to the defendant to plead on payment of costs.

Judgment for the plaintiff.

SAME TERM. *Before the same Justices.*

KIRBY and ROBBINS, appellants, vs. CARPENTER and others, respondents.

Where a surrogate's return upon appeal, assumes to state what the facts are in regard to a claim against the estate of a decedent, without stating what the evidence of those facts was, the court will presume that such facts were legally ascertained by the surrogate, upon sufficient evidence.

If the fact is otherwise, the respondent may compel a further return from the surrogate, showing whether any and what evidence was given in support of the claim.

On the distribution of the moneys arising from the sale of the real and personal estate of a decedent, debts owing by him as a member of a copartnership, should not be placed by the surrogate on a par, or in the same class, with debts owing by the decedent individually; but should be postponed till the individual debts are paid.

And where the surviving partners, after the death of the deceased, pay debts owing by the partnership, their relation to the separate estate of the decedent is not thereby changed. They stand in the place of, and represent, the creditors whose debts they have paid; who can only come in for a share of the assets of the estate, after the individual debts shall have been paid.

On the same principle, the claims of individual creditors are entitled to priority over those of the surviving members of the firm, growing out of the partnership transactions.

Payne v. Mathews, (6 Paige 20,) so far as it conflicts with this decision, disapproved.

APPEAL from a decree of the surrogate of the county of Monroe. The decree appealed from was made on the 17th day of December, 1846, in the matter of the distribution of the money arising from the sale of the real and personal estate of Jeffries Hallowell, late of the city of Rochester, deceased. It stated that the moneys arising from the sale of the real estate of the deceased amounted to the sum of \$605, which had been paid into court by Edmund P. Willis the administrator and Sarah L. Hallowell the administratrix; and that the sum of \$2576,44, proceeds of the personal estate, had also been paid into court by them. The decree then ordered that the sum of \$133,42 be paid from the proceeds of the sale of the real estate to Sarah H.

Kirby v. Carpenter.

Hallowell, widow of the deceased, in lieu of her dower, &c. That \$41,60 be paid to the administrator and administratrix for their expenses of the sale of the real estate, and \$30,17 to the surrogate for his charges, &c. leaving of the proceeds of the sale of real estate \$399,81 to be distributed. That after paying the expenses of administration there remained in court, of the proceeds of the personal estate, the said sum of \$2576,44 also to be distributed. The two sums in court, to be distributed, amounting to \$2976,25. The decree also stated that the individual debts of the deceased amounted to \$5098,54. The decree then stated that William James and John James were creditors of the deceased, and mentioned the amount owing to them and the other creditors respectively, and ordered that the moneys in court be paid out to them in ratable proportions, which would entitle them to be paid at the rate of 58 cents and 3-10ths of a cent upon the dollar, &c. The decree then stated that the deceased, at the time of his death, together with the appellants Willet S. Robbins and Edmund Kirby, were indebted jointly as partners in the sum of \$585,73, and that the latter had paid, since the death of Hallowell, to the creditors of the copartnership \$220 in full satisfaction thereof, and directed that one half of that sum, to wit, the sum of \$110, be allowed to said Kirby and Robbins as survivors, &c. and that the same be paid to them out of any surplus there might be after payment of all the individual debts of the deceased, with interest from the first of March, 1846. The decree also recited that the said Kirby and Robbins as such survivors as aforesaid, had an unliquidated account of \$3657,90, which they claimed as a balance due them from the estate of the deceased, arising out of their joint business, which account was made up, among other things, of joint debts paid by them since the death of Hallowell, and contained credits of property received by them since the death of Hallowell, belonging to the copartnership. And it appearing that the individual debts of the deceased would more than absorb the money in court, it was ordered that the said account of Kirby and Robbins, as such survivors, be allowed and paid out of any such surplus money there might be after the pay-

Kirby v. Carpenter.

ment in full of all the individual debts of the deceased. The surrogate's return stated that on the 3d of September, 1846, he made an order requiring notice to be given, &c. that the distribution of the moneys, &c. would be made according to law at his office in Rochester on the 29th of October then next, which notice was duly published. On the said 29th of October the administrators and creditors of the estate appeared, when the hearing of the matter was adjourned from time to time until the 17th of December, 1846, and on that day the order or decree of distribution was made as above. The return detailed particularly all the proceedings had by and before the surrogate, touching the distribution; &c. It showed that the deceased, Jeffries Hallowell, and the appellants were, at the time of the death of Hallowell, and had been for some time, copartners in the business of buying and selling produce, in which, by the terms of the partnership the said Hallowell was to share one half of the losses and one half of the profits, and the appellants were in like manner to share one half of the losses and one half of the profits. It also appeared by said return that the claims so allowed by the surrogate in favor of the appellants, arose out of the partnership transactions aforesaid. The petition of appeal alledged for error in the decree, that the claims, although allowed and established by and before the surrogate, were, by the decree, postponed to the debts owing by the deceased individually. That the appellants should have been permitted to come in and share equally with the other creditors of the deceased. None of the persons who were intended by the petition of appeal to be made parties respondents, answered the same, except William and John James, who, by their answer, denied that the appellants were creditors of the estate of said Hallowell, or that any proof whatever was given or adduced on the hearing before the surrogate, by the appellants, in support of their said claim.

E. Darwin Smith, for the appellants.

E. Griffin & D. Wood, for the respondents.

Kirby *v.* Carpenter.

By the Court, WELLES, J. With respect to the question whether the appellants' demand was established by sufficient evidence before the surrogate, it is to be remarked that the return assumes to state what the facts were in regard to the claim. It does not state what the evidence of those facts was. We are to presume that they were legally ascertained by the surrogate, upon sufficient evidence. If it were not so, the respondents could have obtained a further return from the surrogate, showing whether any and what evidence was given in support of the claim. (*Halsey v. Van Amringe and wife*, 6 *Paige*, 12.) The claims of the appellants, as appears by the decree and also by the return, consisted of two demands, one of \$3657,90, and the other of \$110. The following is what the return states in relation to them. "Messrs. Kirby & Robbins presented for allowance a claim against the said estate—the balance of an unliquidated partnership account, and three notes of hand, and two other claims—which claims I allowed, and which must give precedence to individual claims, and placed them in the second class of debts (see schedule A) upon the following facts. The unliquidated account of Kirby & Robbins of \$3657,90 was against Jeffries Hallowell, deceased, in his individual capacity, and not a copartnership account, as their counsel alledges. The facts in the case are these. In 1840, Messrs. Kirby & Robbins resided in the city of New-York, and were engaged in business as commission merchants. Jeffries Hallowell, the deceased, resided in Rochester, and was engaged in general produce business, milling, &c. In that year Kirby, Robbins and Hallowell entered into a verbal agreement or arrangement as follows: Hallowell was to purchase wheat, flour, oats, butter, and all other produce on which he might believe money could be made, on joint account. Hallowell, to raise the necessary means and funds to make the purchases, and transact the business, was to draw his drafts in his private name upon time, on Messrs. Kirby & Robbins, New-York, and procure their discount at the banks in the city of Rochester. He was to sell the property where he thought best, or ship the property to New-York to Messrs. Kirby & Robbins for them to sell. Hallowell

Kirby *v.* Carpenter.

was to share one half of the losses and one half of the profits, and Messrs. Kirby & Robbins the same, each receiving no compensation for personal services in the transaction of the business. The joint business had been settled up to February, 1843. Under the foregoing arrangement a large business was transacted and was continued until the death of Hallowell. The unliquidated account presented is made up of the profits and losses, the payment of a portion of the drafts drawn, the payment of debts contracted, in the business, by Hallowell, and the property on hand at the death of Hallowell, &c. The other demands presented by Messrs. Kirby & Robbins are as follows." The return then set forth at length two accounts against the estate of Jef-fries Hallowell, one in favor of Eli Hart, amounting to \$186,97, and one in favor of E. D. Ely for \$65; and then proceeded as follows: " And three promissory notes, each for one hundred dollars, payable one year after date to the order of C. Frost & Co. at the Rochester City Bank, and dated Dec. 6th, 1843, Jan. 16th, 1844, and March 4th, 1844, respectively. These demands Messrs. Kirby & Robbins took up by the payment to the hold-ers of the sum of \$220, as follows:

The demand of Eli Hart & Co. at	- - - - -	\$100
" " E. D. Ely for damages,	- - - - -	20
Three notes of \$100 each to C. Frost & Co.	' - - - -	100
<hr/>		

\$220⁰⁰

The above accounts in favor of Hart and Ely, and the notes to Frost & Co. must be the joint debts owing by Hallowell, Kir-by & Robbins referred to in the decree as amounting to \$585-73, which the appellants had satisfied by paying \$220, one half of which was allowed as a debt due the appellants from the es-tate of Hallowell. The difference in the aggregate amounts would probably be accounted for by computing interest on the three notes to Frost, &c.

Ought the claims of these appellants, or any part of them, to have been placed by the surrogate on a par, or in the same class, with debts owing by the decedent individually, in the distribu-tion of these moneys?

Kirby *v.* Carpenter.

It is a settled rule of equity, that in marshalling the assets of a deceased partner, the partnership property is to be first applied to the payment of partnership debts, and that until such debts are all paid no creditor of the individual partner is entitled to any share in the assets of the partnership. Also, that the separate creditors of the deceased partner are entitled to priority over the creditors of the partnership, in respect to the separate estate of the deceased partner. (*Payne v. Mathews*, 6 *Paige*, 20. *Buchan v. Sumner*, 2 *Barb. Ch. Rep.* 197. *Story on Part.* §§ 363, 364, 365, 376. *Story's Eq. Jur.* § 675. *Jackson v. Cornell*, 1 *Sandf. Ch. Rep.* 348. 3 *Kent's Com.* 264, 265, 3d ed.)

It is equally well settled that the partnership effects are liable to each member of the firm, for the purpose of equalizing and adjusting their claims in relation to the partnership fund. That the claim of one member of a firm upon the firm, arising out of partnership transactions, such as the payment of partnership debts, investment of more than his share of capital, &c. entitles such partner to priority in the distribution of the partnership funds, over a creditor of an individual partner. In such case the member of the firm paying the debts or investing more than his share of the capital, becomes a creditor of the firm. And by the same rule of reciprocity, a creditor of an individual member of the partnership is entitled to preference, as regards the separate property of such partner, over such creditor of the firm. (*Buchan v. Sumner*, 2 *Barb. Ch. Rep.* 197. *Taylor v. Fields*, 4 *Vesey*, 396. *Ex parte King*, 17 *Id.* 115. *Nicholl v. Mumford*, 4 *John. Ch.* 522.)

Testing the present case by these rules, it is clear that the appellants were properly postponed to the individual creditors of the decedent. Their relation to his separate estate is not changed by their paying debts against the firm since the death of their partner. They stand in the place of, and represent, the creditors whose debts they have paid, who can only come in for a share of the assets of the estate after the individual debts shall be paid. And on the same principle the claims of individual creditors are entitled to priority over those of the surviving mem-

Kirby v. Carpenter.

bers of the firm growing out of the partnership transactions, such as this claim of \$3657,90 appears to have been.

The case of *Payne v. Mathews*, (*supra*), is in some respects opposed to such application of the rules above stated. In that case Chancellor Walworth, after fully recognizing the rule that joint creditors of a copartnership are entitled to payment out of the property and effects of the firm, in preference to the separate creditors of the individual copartners, and that such separate creditors have a corresponding right to priority in payment out of the individual estate of the copartners, in case of the death or bankruptcy of the latter, over the partnership creditors, held that a balance due a surviving copartner on account of the copartnership transactions was entitled to come in equally with creditors of the individual deceased partner in the distribution of his individual estate. He places the decision of the question upon those sections of the revised statutes which direct in several cases the distribution of the estates of deceased persons. (2 R. S. 87, § 27; 112, § 73; 453, § 37.) He remarks that "the principle adopted by the revised statutes is, that equality among creditors is equity, in relation to the distribution of the estate of an insolvent decedent, except in those cases where the creditor had proceeded to judgment against the decedent before his death."

If it be true that the statutes referred to were intended to have any influence upon the rules in question, it seems to me that they amount to an abolition of the rules; at least so far as respects their reciprocity. If the statute concerning the duties of executors, &c. in the payment of debts and legacies (2 R. S. 87, §§ 27, 28) is to be literally observed, an executor or administrator of a deceased partner has only to inquire after creditors by "recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts," to ascertain those belonging to the fourth class mentioned in the statute. And he is not to discriminate whether they were partnership or individual creditors. He is only to ascertain whether the decedent was liable, and the claimant's creditors, coming within the description of the fourth class, and the debt must be paid ratably with any others of the same *statute class*. No matter if a solvent

Welch *v.* Lynch.

firm, of which the decedent died a member, is also liable for the same debt. A creditor, in such a case, would be under no obligation to exhaust his remedy upon the partnership effects before coming in for his share of the individual property of the deceased partner.

I do not believe the statute requires such a construction, or was intended to have such an effect. It provides for the order of payment of "*the debts of the deceased*," dividing them into four classes; and no violence will be done to its language by understanding its provisions as subject to the existing rules in equity in relation to the marshalling of the assets of deceased partners and of the partnership estate. The rules referred to have been considered in force as much since the revised statutes took effect as before. They are rules of equity which were never intended to be disturbed or affected by the statute. Before the revised statutes a different rule of distribution prevailed, and which, if literally observed and applied, in all cases, would conflict with the above rules of equity as much as the one established by the revised statutes.

I think that part of the decree of the surrogate, appealed from by the appellants, should be affirmed with costs.

Decree accordingly.

NEW-YORK GENERAL TERM, November, 1849. *Jones, Edmonds, and Edwards*, Justices.

WELCH *vs.* LYNCH.

To a declaration in debt on judgment, the defendant pleaded, 1st. accord and satisfaction by the turning out and acceptance of certain goods in the defendant's store, and 2d. that the judgment was rendered on a cognovit containing a condition that the judgment should be satisfied out of certain specified property of the defendant, and no other, and that such property was so applied by

Welch v. Lynch.

means of an execution issued upon the judgment. The plaintiff replied, taking issue upon the first plea. He also replied to the second plea, not denying any of the facts therein stated, in respect to the condition annexed to the cognovit, or the sale of the defendant's property upon the execution, but taking issue on an averment in the plea that on such sale the property sold for \$3000. On demurrer to the replication it was held good, and the cause went to trial on the issues of fact. Held that on the trial, evidence of the accord and satisfaction was admissible; it not being competent for the court, at nisi prius, to pass upon the question as to the validity of the plea of accord and satisfaction.

Held also that the second plea was not a plea of accord and satisfaction, but was a plea that the debt had been levied upon a *fi. fa.* and was therefore good.

Held further, that upon that plea the *amount* levied, upon the execution, was material; and that the demurrer was therefore properly overruled.

Also held that it was competent for the defendant, on the trial, to give the judgment record and the execution in evidence, for the purpose of proving his plea.

ERROR to the New-York common pleas. The declaration was in debt, on a judgment recovered in the New-York common pleas in May term, 1844, by Lynch against Welch for \$2505,37; admitting a payment of \$1363,63 made thereon by Welch on the 25th of June, 1844; and claiming that \$1141,74 still remained due upon such judgment. The declaration also contained the common money counts. The defendant pleaded two pleas. 1st. That after the confession of the judgment declared on, to wit, on the 25th of June, 1844, the defendant delivered to the plaintiff all and singular the property and effects of the defendant, of great value, to wit, of the value of \$3000, being the same property and effects of the defendant then in the store No. 57 West Broadway, corner of Reade-street, in the city of New-York, consisting of a stock of groceries, fixtures, &c. and being the same previously sold to the defendant by the plaintiff, in full satisfaction and discharge of the said judgment, and of all the said sums of money in the first count of the plaintiff's declaration mentioned, and of the several promises and undertakings for which the judgment was confessed; which property and effects the plaintiff accepted and received of and from the defendant, in full satisfaction and discharge of the judgment, and of all the sums of money mentioned in the first count of the declaration, and of the several promises and undertakings for which the judgment was confessed. 2d. Ad-

Welch *v.* Lynch.

mitting the confession of the judgment, alledging that such confession was by cognovit, to which the following condition was annexed: "*The execution on the judgment hereupon entered, to be levied and satisfied, at any time, upon and out of the property and effects of the defendant, in the store number 57 West Broadway, corner of Reade-street, in the city of New-York, and on and out of no other property whatever of the said defendant.*" The plea then alledged that after judgment was entered upon the said cognovit, a *fi. fa.* was issued to the sheriff of New-York, thereon, against the goods and chattels of the defendant, on which was endorsed a direction to levy \$2050,37 damages and costs, with interest from June 10th, 1844, besides fees, "upon and out of the property and effects of the defendant in the store No. 57 West Broadway, and on and out of no other property of the defendant." That upon such execution the sheriff seized certain goods and chattels of the defendant, of great value, to wit, of the value of \$3000, being the same property mentioned in the confession of judgment, and sold the same at public sale, for \$3000, and delivered the money, after deducting his fees and charges, to the plaintiff; concluding with a verification, and prayer of judgment. The defendant also pleaded *nil debet*.

The plaintiff replied to the first plea, taking issue thereon. To the second plea he replied, that the property and effects of the defendant, mentioned therein were not sold by the sheriff, under and by virtue of the *fi. fa.* as stated in said plea, for the sum of \$3000, but that such property and effects were sold for a much less sum, to wit, the sum of \$1363,63, over and above the sheriff's fees, and that that sum was paid by the sheriff to the plaintiff, and was the same sum mentioned in the plaintiff's declaration, as paid in part of the said judgment.

To this replication the defendant demurred, and assigned the following causes: That the plaintiff had not, by said replication, taken issue upon the matters alledged in the plea, but had attempted to take issue upon a matter not alledged therein, viz. that the property and effects of the defendant were sold by the sheriff for the precise sum of \$3000; whereas the defendant

Welch *v.* Lynch.

had not offered in issue, by the said plea, the allegation that the property and effects were sold for any particular sum. Also, that the plaintiff had attempted to take issue upon an immaterial allegation, laid under a videlicet in the plea, and that the plaintiff had not shown that such property and effects were sold for a less sum than the amount of his debt and costs. The plaintiff joined in demurrer.

The common pleas adjudged the replication sufficient, and overruled the demurrer. It awarded a venire, to try the issues of fact; staying judgment in the meantime. On the trial the plaintiff's counsel insisted that the defendant had, by his plea, admitted the judgment record as set forth in the first count of the declaration; and the plaintiff claimed a verdict for the amount of the balance of the judgment, as set forth in said first count, with interest. The defendant produced, and offered to read in evidence, the judgment record mentioned in the first count of the plaintiff's declaration.

The counsel for the plaintiff objected to the introduction of said record in evidence, because it did not tend to prove the issue to be tried in the cause, and because the defendant having by his plea admitted the judgment declared on, could not in this manner show a variance, or otherwise contradict the allegations in said declaration. The court sustained the objection and rejected the record, to which defendant's counsel excepted. The counsel for defendant then offered to prove and read in evidence a writ of *fieri facias*, issued to collect the amount mentioned in said judgment record and the indorsement thereon. The counsel for the plaintiff objected to the introduction of said *fi. fa.*, as being irrelevant, and not tending to prove the issue to be tried. The court entertained the objection, and refused to admit such *fi. fa.* to be proved and read in evidence, to which the defendant's counsel excepted. The defendant's counsel then produced and offered to prove and read in evidence the cognovit on which said record was founded, and to prove that the same was taken by the plaintiff in person. The counsel for the plaintiff objected to the introduction of said cognovit and evidence, on the same ground that the judgment record was

Welch *v.* Lynch.

mitting the confession of the judgment, alledging that such confession was by cognovit, to which the following condition was annexed: "*The execution on the judgment hereupon entered, to be levied and satisfied, at any time, upon and out of the property and effects of the defendant, in the store number 57 West Broadway, corner of Reade-street, in the city of New-York, and on and out of no other property whatever of the said defendant.*" The plea then alledged that after judgment was entered upon the said cognovit, a *fi. fa.* was issued to the sheriff of New-York, thereon, against the goods and chattels of the defendant, on which was endorsed a direction to levy \$2050,37 damages and costs, with interest from June 10th, 1844, besides fees, "upon and out of the property and effects of the defendant in the store No. 57 West Broadway, and on and out of no other property of the defendant." That upon such execution the sheriff seized certain goods and chattels of the defendant, of great value, to wit, of the value of \$3000, being the same property mentioned in the confession of judgment, and sold the same at public sale, for \$3000, and delivered the money, after deducting his fees and charges, to the plaintiff; concluding with a verification, and prayer of judgment. The defendant also pleaded *nil debet*.

The plaintiff replied to the first plea, taking issue thereon. To the second plea he replied, that the property and effects of the defendant, mentioned therein were not sold by the sheriff, under and by virtue of the *fi. fa.* as stated in said plea, for the sum of \$3000, but that such property and effects were sold for a much less sum, to wit, the sum of \$1363,63, over and above the sheriff's fees, and that that sum was paid by the sheriff to the plaintiff, and was the same sum mentioned in the plaintiff's declaration, as paid in part of the said judgment.

To this replication the defendant demurred, and assigned the following causes: That the plaintiff had not, by said replication, taken issue upon the matters alledged in the plea, but had attempted to take issue upon a matter not alledged therein, viz. that the property and effects of the defendant were sold by the sheriff for the precise sum of \$3000; whereas the defendant

Welch *v.* Lynch.

had not offered in issue, by the said plea, the allegation that the property and effects were sold for any particular sum. Also, that the plaintiff had attempted to take issue upon an immaterial allegation, laid under a videlicit in the plea, and that the plaintiff had not shown that such property and effects were sold for a less sum than the amount of his debt and costs. The plaintiff joined in demurrer.

The common pleas adjudged the replication sufficient, and overruled the demurrer. It awarded a venire, to try the issues of fact; staying judgment in the meantime. On the trial the plaintiff's counsel insisted that the defendant had, by his plea, admitted the judgment record as set forth in the first count of the declaration; and the plaintiff claimed a verdict for the amount of the balance of the judgment, as set forth in said first count, with interest. The defendant produced, and offered to read in evidence, the judgment record mentioned in the first count of the plaintiff's declaration.

The counsel for the plaintiff objected to the introduction of said record in evidence, because it did not tend to prove the issue to be tried in the cause, and because the defendant having by his plea admitted the judgment declared on, could not in this manner show a variance, or otherwise contradict the allegations in said declaration. The court sustained the objection and rejected the record, to which defendant's counsel excepted. The counsel for defendant then offered to prove and read in evidence a writ of fieri facias, issued to collect the amount mentioned in said judgment record and the indorsement thereon. The counsel for the plaintiff objected to the introduction of said *fi. fa.*, as being irrelevant, and not tending to prove the issue to be tried. The court entertained the objection, and refused to admit such *fi. fa.* to be proved and read in evidence, to which the defendant's counsel excepted. The defendant's counsel then produced and offered to prove and read in evidence the cognovit on which said record was founded, and to prove that the same was taken by the plaintiff in person. The counsel for the plaintiff objected to the introduction of said cognovit and evidence, on the same ground that the judgment record was

Swarthout v. Swarthout.

was conditional, the performance of the condition was essential to the validity of the exercise of the power.

The order authorizes the guardian to release, discharge and cancel the bond and mortgage, upon receiving from James Swarthout a bond and mortgage upon unencumbered real estate, &c. It seems to me that it can not admit of a doubt that before the guardian could have any power to act under this provision, he must have received the bond and mortgage, according to the directions of the order. It is averred in the bill that the new security, contemplated in the order, was never taken, and there is no proof in the case that it was. If it was not taken, it follows inevitably that Miller, in assuming to discharge the mortgage, acted without authority, unless he possessed the requisite power independent of the particular provision which assumes to confer it. If so, it was by virtue of his general powers as general guardian.

Admitting that as general guardian he could discharge this mortgage, provided the order had been silent in relation to it, and had given no directions on the subject, I think the fact that the order gives special directions in relation to the power in question, amounts to a restriction of the power; and that the fair and reasonable construction of the order is, that the power to discharge the mortgage was connected with a condition precedent, that the moneys should be first secured upon other property, according to the provisions of the order, before the guardian would be authorized to discharge the mortgage. This construction, I think, derives support from the consideration that the leading and principal object of the proceeding before the vice chancellor was the cancellation of the mortgage. And in making an order to effectuate that object, the court required the taking of other security before the mortgage should be discharged. The guardian in this case was constituted a special agent as respected the discharging of this mortgage, with limited and conditional powers; and his acts were not binding upon the infants, who in this respect were his principals, unless his powers were strictly pursued.

With respect to the question whether the condition was per-

Swarthout *v.* Swarthout.

formed, it is claimed that the trust of a guardian is an office, and that in the absence of proof to the contrary it will be presumed that he has done his duty and taken the security required by the order. I doubt very much whether the rule of presumption referred to ever applies to a case like the present. The guardian is a mere trustee, and in my opinion neither he nor those claiming under him, or claiming a benefit from his acts, has any right to protection under the rule. That where the validity of his acts depends upon the performance of a condition precedent, it must be proved, as much as in any other case. To hold that upon this question the burden of proof was upon the plaintiffs, would be virtually a denial of justice. How would it be possible for them to prove affirmatively that the security was not taken? The order did not restrict the guardian as to the place where the land should be situated upon which the new security was to be taken; not even to the state or territory—while if it was taken, it was a fact which might easily be shown, or might have been ascertained at the time the subsequent conveyances and incumbrances by Swarthout were made.

Again; the discharge, as well remarked by Mr. Justice Hoyt, in his opinion in this case, on its face did not show that the security had been taken. On the contrary, it recited that the money had been paid to Miller on the bond and mortgage. The payment of the money was not a compliance with the order. He had no right to receive the money and discharge the mortgage. It would have been breaking up the investment made by Hunt for his grandchildren, and defeating his benevolent purposes, and was not the intention of the court in making the order. But I apprehend it is not seriously contended that any money was in fact received by Miller as guardian. The idea would contradict the whole history of the case. The certificate of the clerk of Seneca county can not help the defendants. Upon a proper search being made, this mortgage would be found. It would be seen also that the satisfaction was by a person other than the mortgagee. Common prudence would lead to an inquiry as to his authority to satisfy it. The person making the

Drake *v.* Price.

A. Wager, for the plaintiff.

Wm. Eno, for the defendant.

By the Court, BARCULO, J. The husband and wife (now plaintiff) executed a deed, and deposited it as an escrow, to be delivered on the execution of a certain bond and mortgage, the husband subsequently requested the holder of the deed to deliver it; waiving the performance of the condition, the execution of the mortgage. The judge at the circuit, charged the jury, that the consent of the husband to the delivery of the deed, would bind the wife, and that if they found that he had waived the performance of the condition, and requested, and consented to, the delivery, it passed the title, and she could not recover. The jury found for the defendant.

I think the charge was right. The only mode by which the plaintiff could convey was the statutory mode, by signing and acknowledging in a particular form. She having done this, had no power to make an agreement as to the escrow. That was the act of the husband. He had a right to waive it; and having done so, her right is gone. The motion for a new trial must be denied.

SAME TERM. Before the same Justices.

DRAKE and wife *vs.* PRICE and ROBINSON.

Executors, after having received full commissions on a sum of money directed to be invested by them for the benefit of a legatee, are not entitled to charge five per cent for receiving and paying over the interest moneys, to the legatee, annually. They can only charge one per cent.

APPEAL from a decision made at a special term of the court. The complaint alledged that the defendants were the sole acting

Drake v. Price.

executors of the last will and testament of Gilbert Hunter, deceased; that in said will the testator, among other things, directed his executors to place and keep \$5000 at interest as the share of Julia Ann Smith, now the above plaintiff Mrs. Drake, and to receive such interest and pay the same over yearly, and every year, to her during her natural life, and then to divide the principal among her lawful heirs; that the defendants had had the said \$5000 invested since the decease of the testator in the year 1842, and had received the annual interest thereof, to wit, the sum of \$300 per annum, since that time, and had paid part of such sum to such Julia Ann, but had unlawfully retained and withheld a large part of said annual interest, to wit, \$12 each year, and had neglected and refused to pay any or either of such sums of money to the said Julia Ann. And the plaintiffs averred that said executors had received and paid out more than \$10,000 belonging to the estate of the testator besides the said \$5000 invested for the said Julia Ann Drake, and had been allowed and had received the sum of five per cent on the first \$1000 thereof, and two and a half per cent on the next \$4000 thereof, and that although legally entitled to claim and receive but one per cent on all the above, including the annual interest payable to the said Julia Ann, they yet claimed and retained the sums aforesaid, being five per cent thereon, contrary to the statute in such case provided. And the plaintiffs claimed a judgment for the sum of \$85,23, being the aggregate amount of such sums with the interest thereon.

The defendants demurred to the complaint for these causes: 1st. That this court had no jurisdiction of the persons of the defendants; 2d. That it had no jurisdiction of the subject of the action; 3d. That the complaint did not state facts sufficient to constitute a cause of action.

The judge, at the special term, after hearing arguments, upon the demurrer, ordered judgment to be rendered for the plaintiffs, for the amount claimed; with leave to the defendants to answer, on payment of costs. From this judgment the defendants appealed.

Drake *v.* Price.

W. I. Street, for the appellants.

John Thompson, for the respondents.

By the Court, BARCULO, J. The defendants, executors of Hunter's will, invested \$5000 for the plaintiff, Mrs. Drake, pursuant to directions of the will, to pay over to her the interest. This they have done for several years, retaining *five per cent of the interest moneys as commissions*, after having had full commissions on settling the estate. The plaintiffs sue to recover back four per cent, contending that only one per cent can lawfully be taken. I so decided at the special term.

I still think the decision right. The case of *Valentine v. Valentine*, (2 *Barb. Ch. Rep.* 430,) is an authority for saying that commissions are not to be taken in two capacities, i. e. as executors and as trustees. And although in *Vanderheyden v. Vanderheyden*, (2 *Paige*, 287,) full commissions were allowed upon the annual receipts and disbursements, yet it was solely upon the ground that the annual rests, made for the purpose of charging interest against the guardian, were to be considered annual settlements of the accounts. It seems to me that this case is a mere continuance of the executor's duties, and that having received full commissions on \$5000, they can only take one per cent upon the proceeds of the fund, and are not permitted to begin anew every year.

The judgment should be affirmed with costs.

Judgment affirmed.

ONONDAGA GENERAL TERM, November, 1849. *C. Gray, Pratt, Gridley, and Allen, Justices.*

MARCH and GUIVITS *vs.* THE PEOPLE.

An indictment for a conspiracy to cheat and defraud, must set forth the particular means intended to be used by the conspirators, to compass the alledged fraud.

To constitute the offence of conspiracy, there must be a conspiracy to cheat and defraud some person of his property. Although there may have been an intention to defraud, yet if the means used could not possibly have that effect, the offence is not complete.

On an indictment against two, for a conspiracy to cheat, the judgment should be against each defendant, severally, and not against them jointly.

ERROR to the general sessions of Herkimer county. The defendants were indicted for a conspiracy. The indictment alledged that on the 13th day of January, 1848, at Little Falls in said county, N. S. Benton and William Barrett had a demand against the defendant March amounting to \$77; and that the defendants, unlawfully, wickedly, and maliciously contriving, devising and intending to cheat, deceive and defraud them out of the said demand, did between themselves conspire, combine, confederate and agree together falsely and fraudulently to cheat, deceive and defraud the said Benton and Barrett out of the said demand; that the defendants, in pursuance of, and according to the said conspiracy, combination and confederacy did by certain false, fraudulent, injurious and artful acts and devices procure and induce the said Barrett to take into his possession as payment of said demand from the said Peter March, in the presence of the said Guivits, under the false and fraudulent pretence that they were bank notes of the value of \$77, certain worthless paper and fraudulent pictures, and falsely and fraudulently insisted and declared that by such false and fraudulent acts and devices the said demand was paid and satisfied; and then and there further falsely and fraudulently averred and insisted that the said Peter March had, by the acts aforesaid paid and discharged the said demand, in bank notes of the value of

March *v.* The People.

\$77; contrary to the statute, &c. The indictment contained a second count, similar to the first. The defendants pleaded not guilty. On the trial it was proved that Benton and Barrett had a judgment against March, upon which an execution had been issued, and his land had been advertised for sale, by the sheriff. That March called on Barrett, and pretended that he wanted to pay the judgment, the amount due upon which was ascertained to be about \$77; that after calling at Barrett's office several times, in the course of the day, and conducting very suspiciously, he followed Barrett to his lodgings, about dusk, accompanied by Guivits, and said they had come to pay the debt, and asked Barrett if he recollects the amount. That March then asked Guivits for the money, and the latter took out a roll of something which resembled bank notes, and turned them over, as if counting the amount. He then rolled them up, and after laying a piece of silver money upon the roll, handed it to March. The latter laid the roll on Barrett's knee, saying "there is your money. I have paid you. Now don't ask me for it any more." Barrett took up the roll, supposing it to be bank notes, but on examination he found it to consist of 15 or 20 engraved tradesmen's advertisements, &c. worth nothing whatever. On seeing the figures 100 upon some of the papers Barrett observed, "there is some mistake or fraud about this," and endeavored to make March take back the roll; and told him that he should not receive it as payment. March refused to take it back, saying, "I paid you good money, and now you want to palm that off on to me." Guivits remarked, "Do you suppose I let him have that shoemaker's bill? I paid him good money." "Yes," said March, "it was good money you let me have, and I paid it over to him; and he now wants to palm this on to me." At the time of this conversation neither of the defendants had seen either of the papers contained in the roll, after the roll was handed to Barrett. At the time the roll was handed to Barrett, by March, the latter did not ask for, or obtain, a receipt or discharge of the judgment.

The jury found the defendants guilty of a conspiracy to cheat and defraud Benton and Barrett, and the court sentenced them

March v. The People.

to pay a fine of \$100. To reverse this judgment the defendants brought a writ of error.

D. Lake, for the plaintiffs in error.

G. B. Judd, (district attorney,) for the people.

By the Court, PRATT, J. It is perfectly obvious from the terms of the statute defining the crime of conspiracy, that the indictment should set out the particular means intended to be used by the conspirators to compass the alledged fraud. The indictment is based upon the 4th and 5th subdivisions of the 8th section, which reads as follows: "If two or more persons shall conspire either to cheat and defraud any person of any property, by any means which are in themselves criminal; or by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretences, they shall be deemed guilty of a misdemeanor." (2 R. & 691.) It is clear that under this statute the particular means intended to be used should be alledged, in order that the court may see whether they are in themselves criminal, or amount to a cheat, or obtaining goods by false pretences. Every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted. (1 Chit. Cr. L. 169. 9 Cowen, 586. 3 Denio, 91. 13 Wend. 317.) It has frequently been held that an indictment for obtaining money by false pretences should set out the particular pretences which constituted the offence. (2 T. R. 586. *East's Crown L.* 837. 13 Wend. 317. 9 Id. 191. 11 Id. 557.)

So an indictment for a cheat must set forth the means by which the cheat was effected. (2 T. R. 586. *East's C. L.* 837. 3 Chit. Cr. L. 999. 2 Strange, 1127. 9 Cowen, 595.) It would therefore seem to follow that when the charge is a conspiracy to commit those crimes the indictment should be equally explicit. And such was the decision of the court for the correction of errors in *Lambert v. The People*, (9 Cowen, 578.) In that case the decision was made by a bare majority,

March v. The People.

but the dissenting opinions were based upon the assumption that a conspiracy to defraud any one of his property, by any means, constituted a crime. But the revised statutes have put that question at rest, by defining the crime, in accordance with the decision of the majority of the court in that case ; and thus restricting the offence to much narrower limits than the dissenting members of the court assumed the law to restrict it. (*Rev. Notes, 3 R. S. 825. 2 R. S. 692, and note to case above cited.*) Under the statute, therefore, it is clear that the indictment should set out the means intended to be used by the conspirators.

Tested by this rule, the indictment in this case is clearly defective. 1st. The means set out in the indictment do not show that the accused intended to employ any means which were in themselves criminal, or which would amount to a cheat, or obtaining goods by false pretences. It seems that the defendants induced Barrett to take, or rather left with him, some worthless pictures, pretending they were bank notes. But it does not appear that any body was deceived. The mere fact of leaving those pictures with Barrett, and calling them bank bills, in itself, would be a very harmless amusement. It would constitute neither a crime nor a cheat.

2dly. Although the indictment alleges a purpose on the part of the defendants to cheat and defraud Benton and Barrett out of their demand, yet we are unable to see from any of the allegations contained in it, how that was to be accomplished. To constitute the offence, there must be a conspiracy to cheat and defraud some person of his property. Although there may have been an intention to defraud, yet if the means used could not possibly have that effect, the offence is not complete. The demand of Benton and Barrett was not affected by the defendants leaving with them the pictures, although the defendants insisted such demand was thereby satisfied. No receipt was given, nor any thing which might be used as evidence to show a satisfaction of the demand.

From the evidence set out in the bill of exceptions, we may infer that the defendants intended to defraud Benton and Bar-

Fisk *v.* Wilber.

sett, not by insisting that the debt was paid merely, but by committing a far more serious offence—the crime of perjury. It is quite manifest that the defendants meant to go through the forms of a pretended payment, in order that Guivit might swear to facts sufficient to induce a jury to believe that the debt had been actually paid. But this does not appear in the indictment.

This indictment therefore, we think, is bad in substance, and the judgment must be reversed. The judgment, we think also, should have been against each defendant severally, and not against them jointly.

Judgment reversed.

7 395
50h 278

7 396
74h 17

SAME TERM. *Before the same Justices.*

7b 395
78 AD¹ 391

FISK *vs.* WILBER and others.

Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance. But it is not every case of nuisance which will authorize the exercise of the jurisdiction.

It rests upon the principle of a clear and undoubted right to the enjoyment of the subject in question; and will only be exercised in a case of strong and imperious necessity, or where the rights of the party have been established at law.

It is not the peculiar province of a court of equity to construe contracts, and conveyances of water powers, or to ascertain and define the quantity of water granted or reserved thereby.

The principle upon which the jurisdiction of a court of equity rests, in cases of water privileges, arises from the preventive remedy which it can afford, in shielding a party from great and irreparable injury which may threaten him. But the rights alledged to be infringed or threatened must be clear, definite, and certain, or capable of being clearly ascertained; otherwise the party should be left to his remedy at law.

In grants of water privileges, where the construction is doubtful, that interpretation should be preferred which will give to the grantee a right to an unrestricted, rather than to a limited, use of the quantity granted.

Where a grant of a water power specifies the quantity of water to be used, and the mills and machinery to be operated thereby, but the grantee is not confined,

Fisk *v.* Wilber.

in terms, to the use of the mills, &c. particularly specified, the grant will not be construed as restricting the grantee, in the use of the water conveyed, to the particular mills and machinery mentioned in the conveyance.

If the grantee of a water power is not restricted, by the terms of his grant, in regard to the objects to which the same is to be applied, he may apply such water power to any kinds of mills or machinery which his interest may dictate; even though the grantor may own machinery of the same kind, with which the grantee's will come in competition.

No such restriction can be *implied* from the fact that, at the time of the grant, the parties were tenants in common of the water power, and of the mills propelled thereby.

Where the respective rights of persons owning a water power rest in grant, and not in covenant; the right of each party to use the water not being in terms made a condition of the grant, and there being no provision made for the effect of a forfeiture; it will be held that the parties intended their rights under the deed should be fixed and vested, at the time of delivery, and not liable to fluctuate and vary according to future events.

IN EQUITY. This was a rehearing of a cause decided at a special term by Gridley, Justice. The bill was originally filed in the court of chancery, before the vice chancellor of the fifth circuit. The object of the bill was to ascertain, settle and establish, by a decree of the court, the rights and privileges of the respective parties of, in, and to the waters and water privileges particularly described therein. The bill alledged that on the 1st of Jan. 1828, Lodowick and Samuel W. Brown were seised as tenants in common of certain lands, mills and water privileges in Plainfield, with a grist mill, oil mill, saw mill, clothing works and carding machine situated thereon. That on that day they executed a deed of partition of lands, mills, and water privileges, by which Lodowick took a portion of the land, and the saw mill, oil mill, yard, &c. and "so much of the waters to the use and operation of the said saw mill and oil mill which may or shall hereafter rise above the bottom of so much of the timber or plate as now remains upon the dam, now and at all times hereafter, excepting therefrom so much as shall be necessary for the operation of the said grist mill, and the said clothing and carding works." By the same deed S. W. Brown took the residue of the lands, with the grist mill and clothing works, and the undivided half of the carding works, &c. and "so much of the waters to the use and operation of the said grist mill and the said cloth-

Fisk v. Wilber.

ing and carding works which may or shall or does hereafter rise above the bottom of so much of the timber or plate as now remains upon the dam as shall be necessary for the operation of the same as aforesaid." And "to the use and operation of the said grist mill and the said clothier's works, and the said carding works all waters below the bottom of so much of the timbers or plate as now remains upon the dam, *exclusively*." This deed provided that S. W. Brown should maintain 20 feet of the north end of the dam, and the flumes, and not permit any waste of water; and that L. Brown should maintain the remainder of the dam, and the flume belonging to him. It also provided that the parties should erect a stone monument, descriptive of the precise summit level of the bottom of the plate, as the dividing line of waters. The bill alledged that the parties severally entered into the possession of the portions assigned to them; that on the 1st of September, 1843, the plaintiffs contracted with Lodowick Brown to purchase a part of the premises, including the saw mill and water privileges, and took a deed and entered into possession, and had continued to occupy the same. That the consideration of such deed was \$1500, the water privilege being valued at \$1000. That the defendants had deprived the plaintiff of the use of the water, to a great extent, by keeping it below or at the bottom of the plate, except in time of freshets. That the rights and interests of S. W. Brown were vested in the defendants and were occupied by them, who claimed to be the owners. That the defendants had erected and were operating a variety of other machinery not contemplated at the time of such partition, requiring large quantities of water; and had recently erected a saw mill, which they were operating to the plaintiff's injury. The bill further alledged that when partition was made the grist mill was used for custom business and not for flouring, and the clothing and carding works were used only during seasons of cloth dressing and carding wool, for customers and for family use. That no more water was granted to S. W. Brown than was necessary to work the grist mill, carding and clothing works as they had theretofore been used, &c. The bill also alledged that the plaintiff had frequently applied to the defendants to de-

Fisk v. Wilber.

sist from using the water to operate their increase of machinery, and to confine their use of the water to the grist mill, carding and clothing works as originally intended. That sometimes the defendants admitted that the plaintiff had some right to the water, but insisted that it depended upon the will of the defendants; and that they might waste, or use as much for other purposes as would run the grist mill, carding and clothing works constantly, and that they might add to the business requiring water power equal to the grist mill, carding and clothing works, and alternate so as to use the water constantly, and deprive the plaintiff of the use of it. The plaintiff charged that he was entitled to so much of the water for his saw mill and oil mill, and which rises above the bottom of the plate, except so much as is necessary for the operation of the grist mill and clothing and carding works doing custom business, and not as a flouring mill, operating day and night. And he insisted that the defendants had no right to waste the water, nor to add machinery requiring water power, to be used alternately with the grist mill, &c. And the prayer of the bill was that the plaintiff's rights and privileges of and in the water be partitioned, and the rights and privileges of the defendants thereto, might be ascertained, settled and established by the decree of the court; and that the defendants might be decreed to permit the plaintiff to enjoy his rights; and that they might be restricted to such use thereof as justly, legally and equitably belonged to them by virtue of the partition; that the defendants might be decreed to account with the plaintiff for the loss and damage occasioned by their improper use of the water; and for an injunction, &c.

The defendants put in an answer, admitting most of the facts stated in the bill, but denying that the rights of the parties was as claimed by the plaintiff. They alledged that S. W. Brown died in 1832; that on the 29th of December, 1835, Joseph Wilber, one of the defendants became seised of the interest of S. W. Brown, and continued seised till 8th December, 1842, at which time the other defendants became seised. That Joseph Wilber, while owner, greatly improved the construction of the wheels, so as to require less water; and they claimed the right to use the

Fisk v. Wilber.

water thus saved, to carry other machinery ; that there was always a surplus of water, in 1828, and before, and still is, and that the defendants are interested in the surplus water to carry any other machinery ; and they averred that the parties were and are not restricted in the use of the water to any particular kind of machinery. They denied that they had deprived the plaintiff of the use of water by keeping it below the plate ; and claimed the right to use the water assigned to S. W. Brown, and a share of the surplus water to any lawful purpose, and they averred that more grinding was done in 1828 than at the present time. That water power sufficient to carry mills as then constructed was granted, not depending on the business to be done. And they insisted that they had not used as much water as before the new machinery was erected in 1828. They also stated that after the partition L. Brown erected a saw mill with two saws and two wheels, and distinct gearing, and two wheels to carry back the carriages ; and a shingle mill, and a variety of machinery to be carried on by water power, viz. buzz saw, turning lathe and grindstone, which were operated at the same time with the other mills. They denied that there was any doubt about the rights of the parties, and insisted that the plaintiff had an adequate remedy at law. They averred that there was a great surplus of water every year, and that the parties have a right to use it.

A replication was filed, and proofs were taken ; and upon the hearing at the special term the bill was dismissed, with costs. Whereupon the plaintiff moved for, and obtained, a re-hearing.

C. P. Kirkland, for the plaintiff.

J. Ruger, for the defendants.

By the Court, PRATT, J. We have recently had occasion to examine into the power of a court of equity to grant relief in cases of this kind, and to inquire under what circumstances the court will interpose by injunction. (*Olmsted v. Loomis, 6 Barb. S. C. R. 152.*) We said in that case that it was well

Fisk v. Wilber.

established that courts of equity had concurrent jurisdiction with courts of law in cases of private nuisance, but that it was not every case of that kind which would authorize the exercise of such jurisdiction. (*Angell on Water Courses*, 174. *Eden on Inj.* 269. 2 *John. Ch. Rep.* 282. 6 *Id.* 19. 4 *B. & C.* 8.) It rests upon the principle of a clear and undoubted right to the enjoyment of the subject in question; and will only be exercised in a case of strong and imperious necessity, or when the rights have been established at law. In case of an injunction, the necessity that the subject matter should be capable of being clearly ascertained is most obvious, in order that the mandate of the court may be certain, and without ambiguity; that what the defendant is commanded to do or not to do may be certain and definite. (*Ripon v. Hobart*, 3 *Mylne & Keen*, 169.

It is no part of the peculiar powers of a court of equity to construe contracts, or to ascertain the damages to which a party may be entitled in consequence of a breach thereof. These subjects, alone, would not confer jurisdiction. The principle upon which jurisdiction rests, in cases of water privileges, is contained in the preventive remedy which a court of equity can afford, to shield a party from some great and irreparable injury which may threaten him. But the rights in question must be capable of being clearly ascertained, in order that the decree of the court may be obeyed with safety by the party against whom it is directed.

In this case the bill may, and probably does, disclose a case within the equitable powers of the court, provided the construction which the plaintiffs give to the original partition deed be correct. The bill is based upon the assumption that the original deed restricted each party thereto, in the use of the water, to the particular mills mentioned therein; alledging that the defendants have diverted the water to other uses, and applied it to propelling other kinds of mills and machinery. It then prays that *the rights of the parties in relation to the use of the water may be established, and that the defendants may be restricted to such use thereof as they may be found entitled to.* If the plaintiffs are right in their construction of the original deed of

Fisk v. Wilber.

partition, there would be no difficulty in restraining the defendants from diverting the water to other uses. The subject of the restriction would be certain and definite. But if they are wrong in such construction—if the parties are not restricted by that deed to any particular use of the water—if the mills are only mentioned therein as a convenient measure of quantity, a very different case is presented. It then becomes a mere question for the court to determine, in the first place, how much water the defendants are entitled to use; and secondly, how much they have in fact used. These are questions upon the pleadings and proofs in this cause extremely difficult to solve. How are we to ascertain the exact quantity of water to which each party is entitled, so that an injunction may be safely decreed, so that the mandate of the court shall be certain. Suppose we should be satisfied that the defendants had used more water than they were entitled to use: Without being able to ascertain the excess, how shall we prevent them from repeating the injury? An injunction which should merely command them to desist from using more than their just proportion of water would be very difficult to enforce. It is therefore obvious that the court should only interpose by injunction in cases where the subject of it is clear, definite, and certain.

We have felt called upon to make these preliminary suggestions, as well because they may bear upon some of the questions hereafter examined as to correct what seemed to us an erroneous impression prevailing among the profession in relation to the powers of the court, in cases of this kind. From the number of cases presenting similar questions, which have come before us, there would seem to be an impression that it was the peculiar province of a court of equity to construe contracts and conveyances of water powers, and to ascertain and define the quantity of water granted or reserved thereby. We have only to say that the powers of courts of law are amply adequate to define the meaning of contracts; and we know of no peculiar fitness in a court of equity for gauging of water and measuring the quantity to which the parties may be entitled, when the construction of the contract shall have been ascertained.

Fisk v. Wilber.

As a general rule, an approximation to correctness is all that can be attained; and the damages which a court of law has in its power to grant to the injured party, will generally be the safest remedy, and in most cases amply sufficient to protect the parties in the enjoyment of their rights. We repeat that the equitable powers of the court should only be invoked in a case where the subject is capable of being clearly ascertained, and then only to prevent great and irreparable injury.

The parties to this suit claim under the partition deed executed by Lodowick and Samuel W. Brown, in the year 1828; the plaintiff claiming under Lodowick, and the defendants under Samuel W. except as to one-half the carding machine and clothing works which were at the time owned by another person, and now belong to the defendants.

Two important questions arise upon the construction of this deed. *First.* Whether the parties to it are restricted in the use of the water to the particular mills mentioned therein; and *secondly.* If they are not so restricted, is there any restriction which limits the full and free right to apply the quantity to which each party is entitled, to any use, whether such use be injurious to the other party or not.

1. As to the first proposition, the counsel for the plaintiff conceded, upon the argument, that the parties were not restricted to the particular mills therein mentioned. And I give my views upon this point because the point is raised in the case, and also because a clear understanding upon this point may afford some assistance in coming to a correct conclusion upon the other point.

In grants of water privileges, where the construction is doubtful, that should be preferred which would give to the grantee a right to an unrestricted rather than to a limited use of the quantity granted; for such construction is more beneficial to the community, and to the grantee, and can seldom injure the grantor. (15 *Mass. Rep.* 313. 18 *Pick.* 268. 9 *N. Hamp. Rep.* 454. 6 *Id.* 22. 3 *Shep.* 440. 4 *Coke*, 86. 5 *Taunt.* 454. 1 *B. & Ald.* 258. *Angell on Water Courses*,  The water powers furnished by the numerous streams in the country are rapidly increasing in importance and value. *M.*

Fisk v. Wilber.

of them are held by grants in which the mills and machinery most in use in the early settlement of the country are mentioned as the object to which the water is to be applied. The purpose of the purchaser being to apply the water to that kind of mills or machinery, they would of course afford a convenient measure of the quantity of water intended to be conveyed; and hence almost all the early conveyances refer to saw mills, grist mills, and carding machines, and similar machinery. If these grants are to be construed as restricting the use of the water conveyed, to the particular mills and machinery mentioned in the conveyance, as the business wants of the community change, very many of these water powers, would become utterly worthless. And although it may be conceded that the grantees in many cases purchased with the intention of applying the water to the propulsion of the mills and machinery mentioned in his conveyance, and perhaps did not even advert to the future, when in the changed condition of the country they might become useless or unprofitable; yet we can scarcely conceive, unless in some very special case, that the parties should have contemplated any other than the grant of an absolute and unqualified right to a given quantity of water. If the parties intended to limit the use, they would be apt to employ such terms as would indicate such intention.

2. The parties to the partition deed were tenants in common of the premises, and as such had an absolute right to use the same as they pleased. Their object seems to have been simply a partition of the premises. Had the partition been made by commissioners, under the direction of the court, and had they used, in their description of the premises set off to each party, the same terms used in this deed, there could scarcely have been left room for a doubt as to the construction of the terms. But these parties manifestly had the same object in view, viz. to make a final division of the property; and we can discover no reason why terms used by the parties in a voluntary partition should be construed differently from the same terms when used by commissioners in a report or record.

3. Again; we can not conceive of any motive which the

Fisk v. Wilber.

parties could have had in restricting themselves in the free and unqualified use of the water. The partition was evidently intended to be permanent. If they intended to limit the application and use of the water they would have made some provision for the consequences of a misapplication or diversion; as there is no provision for any reversion of the estate, if the mills mentioned in the deed should become unprofitable; and if the parties are limited to those mills, in the use of the water, the whole water power must remain unemployed, and lost, for all practical purposes, to both parties. We can not for a moment suppose that the original parties contemplated any such restriction. Besides, they have shown that they did not, by the practical construction which they have themselves given to the instrument. Both parties have applied the water to uses not specified therein. We have no doubt, therefore, that the mills mentioned in the deed were simply used as a measure of quantity.

This, as we said before, the counsel for the plaintiff concedes. He concedes that the deed does not restrict the parties to the particular mills mentioned therein, but he insists that it restricts each party, in the use of the water, to such mills and machinery as shall not come in competition with, or injure the other party. This brings us to the examination of the second proposition above laid down; which was the main proposition relied on upon the argument, to sustain the plaintiff's case. If the proposition be correct it must grow out of the terms of the deed, or the relation which the parties sustain to each other.

I. We are utterly unable to find any support for the proposition from the terms of the deed. The deed contains language which might possibly be construed as limiting the use of the water to the mills mentioned therein; but if it be conceded that the parties are not limited to those mills, we are unable to find any limitation or restriction, except as to quantity.

II. Can any such restriction be implied from the relation which the parties sustain to each other? We can discover no greater reason for implying such restriction in this case than in any case where a water power is granted. It was urged that we could not suppose that either party intended to give to the

Fisk v. Wilber.

other the right to erect rival mills and machinery. The same might be said with equal pertinency in any other case. Yet we are not aware of any rule which precludes the grantee of a water power from applying such power to any machinery which his interest may dictate; although the grantor may happen to own machinery of the same kind. It is difficult to ascertain any principle upon which such a proposition can be based. The counsel himself was not able, upon the argument, to fix any very definite line which should limit such restriction. It was suggested that the party should be restricted from applying the water to rival machinery—assuming that such use would be injurious to the grantor. But this by no means follows, as a universal rule. It is not probable that the numerous flouring mills at Oswego and Rochester, or the cotton and woollen factories at Lowell, are injurious to each other. In a new country, where timber is abundant, saw mills upon the same stream and in the same neighborhood might be far from detrimental to each other. So that the mere fact that the mills are of the same kind does not determine the question of injury.

III. It must be borne in mind that the rights of the parties here rest in grant, and not in covenant. As the right of each party to use the water is not in terms made a condition of the grant, and there is no provision made for the effect of a forfeiture, we must conclude that the parties intended that their rights under the deed, whatever they were, should be fixed and vested at the time of delivery. But if we attach to the grant an implied condition that the water shall forever be applied to such use as shall not injure the grantor, or, in this case, injure each other, the rights of the parties can never be settled. They would be liable to vary and fluctuate as the business of the country should vary. The water might be used to propel rival machinery so long as such rivalry was not injurious to the other party. But if, from a change of the condition or business of the country, the rivalry should become injurious, the owner of the mills last erected must pull them down. The bare statement of such a proposition is sufficient.

IV. The authorities cited do not sustain any such proposition.

Fisk *v.* Wilber.

The citation from Kent manifestly refers to the general duties of riparian owners, toward each other. The case in 5 Conn. Rep. 210, is an authority, so far as it goes, directly in the teeth of the proposition contended for on the part of the plaintiff. In that case the court held, from the peculiar phraseology of the grant, that the use of the water was intended to be restricted to the particular mills specified therein; and one of the propositions of the learned judge who delivered the opinion of the court, in support of that construction of the instrument, was that if the use was not thus restricted there could be no restriction whatever, and hence rival machinery might be erected. It will therefore be seen that this is the converse of the doctrine urged on behalf of the plaintiff in this case.

V. The bill in this cause makes no such case as that contended for by the plaintiff. Courts of equity have always held strictly to the maxim *allegata et probata*. (*James v. McKernon*, 6 *John.* 543.) The bill proceeds upon the assumption that the deed of partition restricts each party to the mills specified therein. The plaintiff ought not to be permitted to set up an entire new case not made by the bill.

Upon the question whether the defendants have in fact used more water than was used by Samuel W. Brown, for the mills set off to him, it is not necessary to say much. We have already alluded to the principle upon which courts of equity take cognizance of cases of private nuisance, and have shown that neither the bill nor the evidence, as far as this particular point is concerned, presents a case within such principle. Besides, upon the merits, without going over the points examined in the opinion of the justice who heard this cause at special term, we concur in the conclusions at which he arrived. We are satisfied that the proofs do not establish the fact that more water is now used than was used at the time of the partition, for the mills set off to Samuel W. Brown; at least they do not show it sufficiently clear to warrant the interference of this court.

The decree made at the special term must therefore be affirmed, with costs of the rehearing.

SAME TERM. *Before the same Justices.***DANIEL T. MARTIN and C. L. MARTIN vs. W. H. ANGELL.**

Equitable estoppels, or estoppels *in pais* growing out of the acts and declarations of the party sought to be estopped, are applied for the prevention of fraud, and only exist to prevent injury, when equity and good conscience require that the party should not be heard to gainsay his acts or declarations by which another person has been influenced in his conduct.

To create an estoppel which shall preclude a party from alledging the truth, it must appear, 1. That he has made some declaration, or done some act, inconsistent with the truth, with a design to influence the conduct of another; 2. That the party alledging the estoppel was ignorant of the truth, and relied and acted upon the faith of such acts or declarations; 3. That an injury will result to him, if the other party is allowed to gainsay them.

C. entered into a contract with A. & B., by which he agreed to sell and transfer to them, at any time within two years, certain bank stock, at a specified price. Subsequently a conversation was had between C. & A., and others, in which C. informed those present of a proposition made to him by L. to purchase the stock. A. did not assert the claim of himself and B. upon the stock, under the contract with C., but told C. that he "could not advise him, but that he must exercise his own judgment." *Held* that the omission of A. to assert the claim or himself and B. under the contract, and to give notice to C. that their legal rights would be insisted upon, did not operate as an *equitable estoppel*, which would preclude a suit upon the contract, in the names of A. & B.

Held also, that whether the facts proved were evidence of a new agreement between A. and C., rescinding the first, and consenting to a sale of the stock to L., was a question of fact for the jury.

THIS action was brought for the benefit of the Lewis County Bank, as assignee of a contract dated March 17, 1846, by which the defendant agreed to sell and transfer at any time within two years, to the plaintiffs, all the stock in the Lewis County Bank which he had purchased of them, and to which he should get title, at the rate or price the same should stand him in. It appeared upon the trial that the defendant obtained the title to 787 shares of the stock under the arrangement, and that in August, 1847, a tender of between nine and ten thousand dollars was made, in the name and behalf of the plaintiffs, and a conveyance of the stock demanded. It also appeared that in September, 1846, the defendant sold to Lyon, the present cashier of the Lewis County Bank, the stock in question for \$10 per

Martin *v.* Angell.

share; that the bank was then enjoined from the transaction of business, and proceedings were pending for the appointment of a receiver; that there was a proposition that the stockholders should pay in fifty per cent of their stock, in order to prevent the appointment of a receiver, and sustain the bank; that Mr. Lyon, who was then a large stockholder, refused to accede to the proposition, and insisted that the bank should go into the hands of a receiver, unless he, and his friends, could have the control of it by the purchase of a majority of the stock, and refused to make any terms with the defendant, to enable the bank to go on with its business, but offered the price which was finally accepted by the defendant, for the stock, which was its full value; that after he purchased the stock of the defendant, Lyon became cashier of the bank, and afterwards, for the benefit of the bank, purchased from the plaintiffs the contract of the defendant upon which this action was brought.

Before the sale of the stock by the defendant to Lyon, an interview was had at Mr. Bennett's office, between the defendant and David T. Martin, one of the plaintiffs, and John W. Martin, in relation to the sale of the stock to Lyon, in which much was said upon that subject, and the defendant stated the offer of Lyon, and that he refused to make any terms or consent to any arrangement by which the bank could be permitted to go on with its business and the defendant remain the owner of the stock. During this conversation David T. Martin did not object to the proposed sale, but said that he could not advise the defendant, and that he must exercise his own judgment. At the close of the evidence the defendant moved for a nonsuit, upon the ground, among others, that David Martin consented and agreed to the sale and transfer of the stock to the said Lyon, and was thereby estopped from calling on the defendant for a conveyance of the stock, pursuant to the written contract. The plaintiffs' counsel insisted that nothing like an estoppel was shown; that the court could not say the fact of consent to transfer the stock to Lyon was so established as to constitute an estoppel, and that the motion should be denied. The judge decided that the evidence given of what passed at Bennett's office,

Martin v. Angell.

estopped David Martin from now calling upon the defendant under the contract in evidence, to transfer the stock to the plaintiff; and on that ground he nonsuited the plaintiff. The plaintiff, on a bill of exceptions, now moved for a new trial.

S. Beardsley, for the plaintiff.

T. C. Chittenden, for the defendant.

By the Court, ALLEN, J. The only material question presented by the bill of exceptions in this cause, is whether the facts found upon the trial created an estoppel, and precluded the plaintiffs from enforcing the contract of March, 1846. As an estoppel operates to exclude evidence, the question whether it has been established must necessarily be a question of law, to be decided by the court, although it may incidentally require the decision of questions of fact. The judge was therefore right in deciding the question as matter of law, and not submitting it to the jury. (*Co. Litt. 352 a. Steph. Pl. 239. Lewis v. Carstairs*, 5 *Watts & Serg.* 209. *Dezell v. Odell*, 3 *Hill*, 215. *Hall v. White*, 3 *C. & P.* 136. *Cowen & Hill's Notes*, 200 *et seq.*) The doctrine of estoppels, legal as well as equitable, has been so frequently and fully discussed in the recent cases in this country and in England that a review of the cases, or an elaborate discussion of the principle, would be out of place. The doctrine of equitable estoppels, to the extent to which it is now carried, is comparatively of modern origin; or in other words, by the recent decisions it has been extended to cases in which it would not have been applied at an earlier day. As there is no pretence of a technical or legal estoppel, which must be by deed or matter of record, it is with this equitable estoppel, or estoppel *in pais*, growing out of the acts and declarations of the party sought to be estopped, that we have to do in this case. Such estoppels are applied for the prevention of fraud, and only exist to prevent injury when equity and good conscience require that the party should not be heard to gainsay his acts or declarations by which another person has been influenced in his con-

Martin v. Angell.

duct. (*Greenl. Ev.* § 207.) To create an estoppel which shall preclude a party from alledging the truth it must appear, 1. That he has made some declaration, or done some act, inconsistent with the truth, with a design to influence the conduct of another; 2d. That the party alledging the estoppel was ignorant of the truth, and relied upon and acted upon the faith of such acts or declarations; and 3d. That an injury will result to him if the other party shall be allowed to gainsay them. (*Robinson v. Nahon*, 1 *Camp.* 245. *Greenl. Ev.* § 27. *Parker v. Barker*, 2 *Met.* 423, 431. *Dezell v. Odell*, *supra*. *Welland Canal Co. v. Hathaway*, 8 *Wend.* 483. *Tufts v. Hayes*, 5 *N. Hamp. Rep.* 453. *Pickard v. Sears*, 6 *Ad. & El.* 469. *Gregg v. Wells*, 10 *Id.* 90. *Stephens v. Baird*, 9 *Cowen*, 274.) Testing this case by this rule, which appears to be well established by the cases cited, it wants many of the ingredients of an equitable estoppel, which would operate to preclude the plaintiff from insisting upon the contract of March, 1846. (1.) Martin, upon the occasion relied on by the judge at the trial as establishing the estoppel, made no declarations or representations whatever in relation to the contract. (2.) The existence of that contract, and every fact connected with it and material to determine the rights of the parties to it, were as well known to the defendant as to Martin. There was no withholding or concealment of facts; and the defendant was as much bound to understand the law as was Martin. It is true that Martin did not, upon that occasion, assert the claim of himself and co-plaintiff under the contract, and give notice to the defendant that their legal rights would be insisted upon. But if they had legal rights they were known to the defendant as well as to Martin; and it was his duty to protect himself against them, if he did not mean to acquiesce in them. Neither did the defendant, upon that occasion, assert that in case of a sale of the stock to Lyon he should not perform the contract or should consider it rescinded, so as to make it necessary for Martin to speak under the penalty of being forever thereafter silent upon the subject of any claim under the contract. How can it be said that a fraud was perpetrated upon the defendant by the omission of Martin to speak of mat-

Martin v. Angell.

ters equally well known to the parties, and of which the defendant did not choose to speak? Fraud and injury must concur, to create an estoppel *in pais*.

But it is said that the evidence establishes the consent of Martin to the transfer of the stock, which necessarily disabled the defendant to perform his contract. Whether it necessarily follows that by such transfer the defendant would not be able, or did not design, to fulfil his contract, I do not deem it necessary to consider. The only effect of the evidence, in this view, to give it its utmost latitude, would be to establish a new agreement between the parties rescinding the agreement upon which the action is brought. An agreement may be rescinded expressly by an agreement to that effect; or by a technical release; or impliedly by a new agreement inconsistent with the first. (*Chit. on Cont. 7th Am. from 3d Lond. ed. 741, note u.*) What effect should be given to the evidence as tending to establish such new agreement is not before us for decision. It is very clear that whether there was or was not a new agreement, either expressly or impliedly rescinding the agreement of March, 1846, or whether the defendant supposed that Martin assented to such rescinding, and was authorized so to suppose from the acts or declarations of Martin which would bind Martin as upon a formal agreement, would be a proper question for the jury under proper instructions from the court. It could not create an estoppel which would authorize the court to take the case from the jury. If the defendant had introduced in evidence a technical release, purporting to have been executed by the plaintiffs, the genuineness of the release, and whether procured by fraud, would have been a question for the jury. So in this case, the existence of a new contract, or a state of facts which shall be evidence of a new contract between the parties, were proper questions for the jury. But without pursuing this subject further, it is sufficient to say that there was no estoppel established by the evidence, which justified the nonsuit. A new trial must be granted; costs to abide the event.

7b 412
50ad549.
f50ad550

SAME TERM. *Before the same Justices.*

HOUGHTALING adm'r &c. vs. MARVIN.

The interest which will authorize the execution of a power, after the death of the principal, must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing.

Where there is merely a power given to a creditor to receive a debt, expressly for the purpose of liquidating the claim of the creditor, but unaccompanied by an actual assignment of the debt, or by any security to which the power might have been ancillary, it is revoked by the death of the principal.

But where a person pays or advances money to another, and takes an order upon a third person, as a security for the sum so paid or advanced, to that amount the order will operate to transfer the fund, and will become a power coupled with an interest, which will survive the drawer.

And the fact that the drawer, in giving the order is acting as administrator, does not alter the principle.

But if the holder of such order, after the death of the drawer, pays money to a creditor of the drawer, upon the faith of such order as a security, he does it without authority, and in his own wrong.

THIS action was brought by the plaintiff as administrator *de bonis non* of the estate of Isaac Wilcox, deceased, to recover a sum of money alledged to have been received by the defendant to and for the use of the estate. The intestate was a stockholder in the Cochection and Great Bend Turnpike Company, and in the spring of 1842, several years after his decease, there was standing to his credit, upon the books of the company, \$76 for dividends upon his stock for the two years preceding. On the 6th of April, 1842, Zera E. Hayden, the administrator, drew for the amount upon the treasurer of the company in favor of the defendant, payable to him or his order, and on the 22d of May the defendant acknowledged the receipt of a certificate of deposit in the Broome County Bank, for the amount. On the 25th of the same month he received \$75 for the certificate, at the Syracuse Bank. The administrator, Hayden, died on the 18th of April, 1842. It was proved that in March or April, 1842, the administrator talked of going to Cochection to get the money, and wanted it to pay one Tyler, and that the defendant,

Houghtaling *v.* Marvin.

who was his son-in-law, told him that he could get the money more cheaply by writing, and proposed to write for him. The defendant also proved by Tyler that in the spring of 1842, Hayden was indebted to him upon a note past due, and came to him with the defendant, and desired him to wait for his pay until he got the turnpike stock money from Pennsylvania, and said if he could not wait he would get the defendant to send him some money. And that the defendant told him if he could not wait, to send to him, at Baldwinsville, and he would send him up some money, and that he sent down and got \$30 or \$40, and in June the defendant paid the balance. The whole amount was about \$70. The cause was tried before Justice C. Gray, at the Onondaga circuit. The jury, under the charge of the court, rendered a verdict for the defendant, and the plaintiff moved for a new trial, upon a case.

H. P. Winsor, for the plaintiff.

J. Noxon, for the defendant.

By the Court, ALLEN, J. It is very clear, from the evidence, that the bill or order of the administrator Hayden upon the treasurer of the turnpike company, for the dividends upon the stock of the intestate, was not intended as an absolute transfer of the fund to the defendant. It was an authority to him to receive the money; and unless it was a power coupled with an interest in the defendant or some other person, the authority was revoked by the death of the principal, (Hayden,) before the receipt of the money, and the defendant, upon its receipt, became a trustee for the representatives of the estate of Wilcox. The interest which will authorize the execution of the power, after the death of the principal, must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing. (*Hunt v. Rousmanier's Executors, 8 Wheat. 174.*) If there is merely a power to a creditor to receive a debt expressly for the purpose of liquidating the claim of the creditor, unaccompanied however by an actual assign-

Houghtaling v. Marvin.

ment of the debt or by any security to which the power might have been ancillary, it is revoked by the death of the principal. (*Lepard v. Vernon*, 2 V. & B. 51. *Paley on Agency*, by *Dunlap*, 186. *Story on Bailm.* § 209. *Story on Agency*, §§ 488, 489.)

In this case the legal title to the fund in the hands of the treasurer of the turnpike company was by the order of Hayden vested in the defendant to the amount advanced by him upon the faith of such order. The order itself, without consideration, was a naked power to receive the money for the use of the drawer, and was revocable at his pleasure, or by his death. But if the defendant paid or advanced money to Hayden and took the order as a security for the sum so paid or advanced, then, to that amount the order operated to transfer the fund, and became a power coupled with an interest, which survived the drawer. (*Knapp v. Alvord*, 10 *Paige*, 205. *Tate v. Hieber*, 2 *Ves.* 111.) It can make no difference that Hayden was acting as administrator. Having funds belonging to the estate, at a place distant from his residence, he had the right to transfer them in this manner, with a view to realize them at the point where they were wanted for the purpose of administration. The mere fact that Hayden drew the bill as administrator, in favor of a third person who was willing to discount it, or advance the money upon it, would not, of itself, be evidence of a *devastavit*, or charge the drawer of the bill with the receipt of moneys to the use of the estate. Whether the defendant did advance money to Hayden upon the faith of the security furnished by the bill, and take and rely upon the bill as such security, and if so, to what amount, does not very distinctly appear; although, had that question been put to the jury and they had found in favor of the defendant, to the amount paid by him to Tyler before the death of Hayden, perhaps the verdict could not have been set aside as against evidence. But the amount paid to Tyler, after the death of Hayden, was paid by the defendant without authority, and in his own wrong. He was the son-in-law of Hayden, living in the same neighborhood, and knew of his death. He says that he assisted in the settlement of his es-

Houghtaling v. Marvin.

state. He therefore can not claim to have paid it in ignorance of his death, and to be protected within the principle of 2 Ves. 111; and Smart v. Illery, (10 Mees. & Wels. 1.)

It can not be claimed that for that amount the order was a power to the defendant coupled with an interest in himself or in Tyler, the creditor of Hayden. Not for his own benefit, for he had not paid the money to Tyler, nor had he become bound, as surety for Hayden, or otherwise, to pay it to him. Not for the benefit of Tyler, for the reason that there was no attempt to transfer the fund to him, or give him any pledge or lien upon it. Hayden, up to the time of his death, had complete control of this part of the fund, and if he had at any time directed the defendant to pay it to Tyler when received, he could, while living, have revoked the order; and it was revoked by his death. The justice charged the jury that if there was an arrangement between the defendant and Hayden by which he was to draw the money and pay it over to Tyler or retain it for advances made or to be made by him, for Hayden, and if he did draw and pay it over, in pursuance of such arrangement, then he was not liable. That if the jury found that there was such an arrangement the defendant might be regarded as the mere agent of Hayden in drawing and paying over the money, and that even if Hayden had not the right so to direct its disposition the defendant was not liable. This part of the charge was too broad, and should have been qualified. For if, as supposed, the defendant was the mere agent of Hayden to pay the money to Tyler, the agency ceased at the death of Hayden, and a payment after that time was without authority. And for the amount so paid the plaintiff was entitled to a verdict.

Without examining the other questions made upon the argument, a new trial must be granted; costs to abide the event.

7 416
66 219
68 310

SAME TERM. *Pratt, Gridley, and Allen, Justices.*

SMITH and others *vs.* HELMER.

Where the title of a statute was, "an act to provide for the construction and alteration of the highway *between* the village of Herkimer and Middleville," and the first section appointed commissioners "to alter, reconstruct, and improve the public road leading *from* the village of Herkimer to the bank of "a creek within the village of H. " and thence along or near the bank of the said creek to the village of M.;" *Held* that the word *from*, in the act, must have a reasonable construction, in reference to the subject matter; and it appearing that unless it was adjudged to include some part of the village of H. the object of the grant could not be accomplished, nor the entire road be improved, it was *also held* that the word "from" must be taken inclusively, and not so construed as to prevent the commissioners from entering upon lands within the limits of the village of H.

Held further, that to affect the construction of the statute, and to show that the legislature intended to authorize the making and alteration of the road within the village of H., evidence that the particular road was the only road answering the description in the statute, was competent.

In a case of doubtful meaning, reference may be had to extrinsic circumstances, to ascertain the intent of the legislature, in the use of particular words.

Such evidence is proper, whenever words may have different meanings, under different circumstances.

A statute providing for the construction and alteration of a highway within the limits of an incorporated village, and appointing commissioners for that purpose, but which does not profess to, and does not, impair or abridge, or enlarge the rights, duties, or powers of the trustees of the village, as commissioners of highways, will be considered as merely an exercise, within the corporate limits of the village, of the right of *eminent domain*, with which the state has never parted.

Such a statute does not require a two thirds vote, to render it operative within the limits of the village, under the section of the constitution of 1821, requiring the assent of two thirds of the members of each house to every bill creating, altering, or renewing any body politic or corporate.

Laws affecting municipal corporations may be passed by mere majority votes.

The notice required by the statute, (1 R. S. 155, § 1,) to be given of an intended application to the legislature for an act authorizing the making or improving of a road, was calculated merely to guard the legislature from surprise and fraud, and to prevent hasty and improvident legislation.

The law requiring such notice to be given did not confer any new power upon the legislature, depending upon the publication of the notice. It is a rule made by the legislature for its own convenience, and may be entirely disregarded, without affecting the validity of the act.

Smith v. Helmer.

But if a compliance with the requirement were necessary to the validity of the act, as affecting the regularity of its passage, and its validity could be questioned in a collateral manner, for the want of the proper notice, the publication of the notice required by law would be presumed. *Per ALLEN, J.*

Parol evidence of the action of commissioners appointed under and in pursuance of an act to provide for the construction and alteration of a highway, in relation to the alteration of the road at a particular place, at a meeting of all the commissioners upon that subject, is admissible; where it does not appear that any record of the proceedings at that meeting was kept, and the statute did not, in terms, require a record of the proceedings of the commissioners to be made.

Where, in an action of trespass *quare clausum fregit*, the defendant justifies under an act providing for the construction and alteration of a highway, alledging that he did the acts complained of, by the direction of the commissioners named in the act, and for the purpose of altering the road at the place in question, evidence showing that all the commissioners met and conferred together upon the subject matter of the alterations, and assented to them, and conferred upon one of their number authority to execute their determination, and make such alterations, under whose directions and instructions the defendant acted, is sufficient to sustain the defence.

Where an act, authorizing the taking of private property for public purposes, provides for a just compensation to the owner, it is not unconstitutional because it omits to make the assessment and payment of damages a condition precedent to an entry upon and occupation of the premises.

It is sufficient that the act makes provision for compensation to the owner. The assessment and payment of damages need not precede such entry and occupation.

THIS was an action of trespass *quare clausum fregit*, tried at the Herkimer circuit in December, 1848. The *locus in quo* was situated within the village of Herkimer, and the alledged trespass consisted in the removal of a fence on the line of a road. The defendant justified under the act of May 12, 1846, (*Laws of 1846*, p. 305,) alledging that the fence was removed by authority of the commissioners in that act named, and to shorten and straighten the road therein mentioned. The removal of the fence by the defendant was proved, and that the premises were about one-fourth of a mile from the compact part of the village of Herkimer; that the road passing the premises runs to the bank of the West Canada creek, and up along the creek to Middleville; and that there was no other road answering the description. The defendant gave in evidence the act above mentioned, and a diagram of the village of Herkimer, and of the premises, with the adjacent road or street, and proved

Smith *v.* Helmer.

that 20 or 30 days before the removal of the fence the three commissioners named in the act met at a place called the dug-way, on the line of the road from Herkimer to Middleville, and conferred upon the subject of the alterations they thought necessary to be made ; that but three alterations were talked of then, and the alteration of the line of the road at the *locus in quo* was one of them. That the commissioners then directed one of their number to go on and survey it out and do the necessary work upon it ; that it was agreed that the road should be widened and straightened at that place ; and it was left to one commissioner to employ a surveyor and do the work. The defendant proved that the road was surveyed and staked out under the direction of the commissioner, and that such commissioner and one other of the commissioners, at a subsequent meeting, agreed that it was correctly done, and that the fence was removed in pursuance of the directions of the commissioner, to whom the work had been intrusted by the commissioners, at their first meeting. Several questions upon the admission of evidence, as well as upon the merits, were made upon the trial ; and at the close of the evidence the judge directed a verdict for the defendant ; and the plaintiff now moved for a new trial, upon a bill of exceptions.

G. B. Judd, for the plaintiff.

C. A. Benton, for the defendant.

By the Court, ALLEN, J. The first exception taken upon the trial was to the admission of evidence on the part of the defendant, of the location of the premises within the village of Herkimer. There can be no doubt that it is the right of a party, in all actions of this kind, to locate the premises by the evidence as particularly as he pleases. It is the duty of the plaintiffs in the first place to show the situation and location of the premises in question ; and it is the right of the defendant to show the particular description and location. The evidence may be important upon questions of title, boundary, or damages.

Smith v. Helmer.

The evidence was clearly admissible, and no question upon the effect to be given to it is presented by this exception. The plaintiff also excepted to the admission of evidence that the road passing the premises in question was the only road leading from the village of Herkimer to East Canada creek, and thence to Middleville. It was competent for the defendant to show that this road answered the description in the statute designating the road to be improved. This was necessary to the justification of the defendant, and to connect his acts with the authority conferred by the statute. And proof being given that this road in question corresponded with the description in the statute, it would necessarily follow that the court and jury must apply the act to that road, unless it was known that there was another road to which the description would equally apply. In that case there would be an ambiguity to be explained by extrinsic evidence. In this case there was no evidence that there was any other road to which the entire description could apply; so that evidence that this was the only road leading from Herkimer village to the West Canada creek, was entirely unnecessary with a view to determine what road was intended by the act. But it was nevertheless competent, with a view to put beyond a doubt that which would, without such evidence, be merely a legal and necessary inference from the other evidence. The evidence was proper upon another point in the case to which it is not necessary to refer in this connection. The defendant then offered as evidence the act under which it was alledged the entry was made upon the plaintiffs' premises, viz.: "an act to provide for the reconstruction and alteration of the highway between the village of Herkimer and Middleville, in Herkimer county," passed May 12, 1846, which was objected to, for several reasons which will be noticed in their order. The plaintiffs excepted to the decision admitting the act in evidence. The first objection was that the act was inoperative within the village of Herkimer, for the reason that the road mentioned in it started from the village of Herkimer and not from any point within the corporate boundaries, and therefore an entry upon the plaintiffs' premises within the limits of

Smith *v.* Helmer.

the village, was unauthorized. The title of the act, (*Laws of 1846*, p. 305,) is "to provide for the construction and alteration of the highway *between* the village of Herkimer and Middleville," and the first section of the act appoints commissioners "to alter, reconstruct, and improve the public road leading *from* the village of Herkimer to the bank of the West Canada creek, and thence along or near the bank of the said West Canada creek to the village of Middleville." The word "from," in the act, must have a reasonable construction in reference to the subject matter; and unless it is held to include some part of the village of Herkimer, the object of the grant, which was to construct a good road from the village of Herkimer for practical purposes, and therefore necessarily from the compact part of the village, can not be accomplished. Neither can the entire road described in the act be improved; for a part of that description is of the road within the village, and will apply to no other road, nor to that road, without the village. The road described leads *from* the village of Herkimer to the bank of West Canada creek, &c. This is the only road that answers the description, and it reaches the bank of the creek within the village. It therefore follows that *from* must be taken in this case inclusively. "*From*" is opposed to "*to*," and the latter word has been taken inclusively in a case on all fours with the one before us. (*Farmers' Turnpike Co. v. Coventry*, 10 John. Rep. 389.) And in that case, as well as in *The Mohawk Bridge Co. v. The Utica & Schenectady Railroad Co.* (6 Paige, 554,) reference was had to extrinsic circumstances, to ascertain the intent of the legislature in the use of particular words. That must be proper when the words may have different meanings under different circumstances, as in this case. In the latter case it was held that the words "at or near" might, and did, include a point *within* the city of Schenectady. If, in this case, the act had authorized the construction of the road from Middleville *to* Herkimer, it would have been precisely within the decision in the *Farmers' Turnpike Co. v. Coventry*, and it can not affect the construction of the act that the terminus at Herkimer is first named in the description of the road. To

Smith v. Helmer.

affect the construction of the statute and show that the legislature intended to authorize the construction of the road within the village of Herkimer, the evidence that this was the only road answering the description in the statute was competent. Extrinsic evidence is admissible, and frequently resorted to, to aid the court and jury in the application of terms used in a statute. (*United States v. Breed*, 1 *Sumner's Rep.* 159. *Hayden's case*, 3 *Coke's Rep.* 7 b. *Devonshire v. Lodge*, 7 *B. & Cress.* 39.)

It was next objected that the act was not passed by a vote of two thirds of the members elected to the legislature, and that therefore it was inoperative, within the limits of the village of Herkimer. By section 9 of article 7 of the constitution of 1821, the assent of two thirds of the members elected to each branch of the legislature was required to every bill creating, continuing, altering or renewing any body politic or corporate. But the act in question does not profess to be an act of that character. It does not affect the corporate rights of the village of Herkimer. It neither adds to, nor detracts from, the powers of the officers of the corporation or the corporators. It is but the exercise, within the corporate limits of the village, of the right of eminent domain, with which the state has never parted. The powers and duties of the trustees of the village, as commissioners of highways, are not impaired or enlarged by the act. (*Ontario Bank v. Burrell*, 10 *Wend.* 86.) In *Mitchell v. Halsey*, (15 *Id.* 241,) and *Whitney v. Johnson*, (12 *Id.* 359,) general laws were held not applicable to, or controlling, the jurisdiction and powers of officers of municipal corporations, for the reason that they were not within the words of the acts, and not because the acts required two third votes. (See *Graves v. Otis*, 2 *Hill*, 466, 471. *Hart v. Mayor of Albany*, 3 *Paige*, 213. *People v. Morris*, 13 *Wend.* 325.) It was insisted by the plaintiff, thirdly, that the act was not properly in evidence for the want of proof that notice of an application therefor had been published pursuant to 1 *R. S.* 155, § 1. Such proof can not be necessary. It is mere evidence of the sense of the profession, and the understanding of our courts, upon this subject, that while our books

Smith *v.* Helmer.

of reports are full of cases involving questions upon private acts, of incorporation, and other acts plainly within this provision, no question of this kind has ever been made. It is true, this is not conclusive, but is a consideration entitled to some weight upon a doubtful question. But I have no doubt upon the subject. The legislature had full power and authority to enact this law, under the constitution from which it derived its power. The law requiring notice did not confer any new power upon the legislature, depending upon the publication of the notice. It was a direction to the public, calculated merely to guard the legislature from surprise and fraud, and to prevent hasty and imprudent legislation. It was a rule made by the legislature for its own convenience, and might be entirely disregarded. A law within the terms of the requirement would be valid, although no notice of the application was published. But, as was said before, the legislature had jurisdiction in the premises without reference to the act, and if a compliance with its terms were necessary to its validity as affecting the regularity of its passage, and its validity could be questioned in this collateral manner for the want of the proper notice, the publication of the notice required by law would be presumed. *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium.* (*Co. Lit.* 6 b. *C. & H. Notes*, note 296, p. 288.)

The plaintiff objected to proof by parol of the action of the commissioners in relation to the alteration of the road at the place in question, at a meeting of all the commissioners upon that subject, and excepted to the ruling of the judge admitting such evidence. It did not appear that any record of the proceedings of that meeting was kept, and the act under which the commissioners acted did not, in terms, require a record of their proceedings. The only note or memorandum of their proceedings which the commissioners were expressly required by the terms of the act to make or keep was that required by section 7. By that section they were required to cause a map and description in writing, signed by them or a majority of them, of the changes and alterations of the route on said road, to be filed in the office of the town clerk of the town of Herkimer. This

Smith v. Helmner.

was not a condition precedent to their entry upon the lands to be taken. A survey and examination was first to be made, and the making the map, if not the survey, was necessarily preceded by the determination of the commissioners to make the alterations. This determination must necessarily rest in parol until the record of the alterations was made and filed. No record or memorandum which the commissioners could make, except the map and description of the alterations, would be evidence of their acts. An omission to reduce their proceedings to writing in the form of a record, that duty not being required by the act, can not invalidate them. It was, I think, clearly competent for the defendant to show by parol that the three commissioners met, deliberated, and agreed upon the alterations in question. 1. It was not required by the act that any record of their proceedings should be made. 2. If made and kept it would not have been evidence of the facts stated. 3. The fact that all the commissioners met and acted in the premises was necessary to justify the acts of the defendant under an order proceeding directly from one of them, acting by authority of all, and to sustain and authenticate the map and description of the alterations afterwards made and filed, signed by only two of the commissioners. The evidence of this fact necessarily rested in parol.

The next exception was to the admission of evidence of what transpired subsequently between two of the commissioners, one of whom had been authorized by all to make the proposed alterations, and is untenable. There can be no doubt that the three commissioners having met and consulted and agreed upon the alterations, the power to make them might be deputed to and vested in one of their number. The object of a joint meeting was fully obtained, and the judgment of all was exercised upon the subject matter of the power; and the execution of the determination was a ministerial act. Indeed, the three having met and conferred, any two of them could have subsequently agreed upon a plan of alterations; they having had the benefit of the advice and suggestions of their fellow commissioner. (*Rogers v. Rogers, 7 Cowen, 526, and note (a) at end of the*

Smith *v.* Helmer.

case.) But the evidence was material, and was admitted only to show that the commissioner to whom the power had been delegated had performed the duty imposed upon him by all the commissioners in respect to the alteration of the road at the place in question. It was a part of the *res gestæ*. It is very clear that it was not proper to show the acts of the two as the acts of the board of commissioners, and the evidence was not admitted with that view. The acts of the defendant must be justified under the determination and orders of the commissioners at a prior meeting. The evidence of what Commissioner Barckley said at the subsequent meeting is entirely immaterial, and can not affect the result of the case. If, however, the three commissioners had, at a meeting for that purpose, agreed upon and determined to make the alterations in question, as it appears they had done, then any of the commissioners, whether expressly authorized or not, could execute this determination, and carry out the plan adopted by the three. (*Bronson v. Mann*, 13 *John.* 460.)

The next point made by the plaintiff upon the trial was upon the admission of evidence of the appointment of Spencer as a commissioner in place of Caswell, who declined further to act. This appointment was made in July, 1846. The county judge of Herkimer county was authorized by the act to fill any vacancy which might occur by the death, refusal, or neglect to serve, of any of the commissioners. At the time of the refusal of Caswell further to serve as a commissioner, the duties of the commissioners, in respect to the alteration in question, were not fully performed. The map and description required by law had not been made or filed, and the damages of the plaintiff had not been assessed or paid. The refusal of Caswell longer to serve did not annul the proceedings of the commission up to that time, but such prior acts were valid, and to be completed by the new board after the vacancy was filled; and although it was not material to the justification of the defendant to show that the commissioners ever entirely completed their duties by making and filing a description of the road, still, if the defendant, for any reason, chose to do so, the evidence was competent, as

Smith v. Helmer.

proof of the vacancy, and the appointment of Spencer to fill it, was necessary to show his authority to sign the map and description.

So of the next objection of the plaintiff, which was to evidence of the map and description of the alteration signed by only two of the commissioners, and made and filed in January, 1847. It was not necessary to the justification of the defendant to show that any map and description of the alterations had been made and filed by the commissioners. The making it was not a condition precedent to an entry upon the plaintiff's premises to make the alterations. (*Estes v. Kelsey*, 8 *Wend.* 555. *Woolsey v. Tompkins*, 23 *Id.* 324. *Hallock v. Woolsey*, *Id.* 327.) If the commissioners were authorized, upon making the map and description, to enter upon the premises and make the alterations, the defendant, who was a mere servant and agent, could not be made a trespasser *ab initia* by a subsequent omission of the commissioners to make and file such map and description. But the evidence was competent for the defendant, if he chose to give it. It is not for the plaintiff to object to evidence showing that every step has been taken which is made necessary to vest a perfect title to the *locus in quo* in the public, for the purposes of a road, notwithstanding evidence falling short of this might be sufficient for the defendant. It was sufficient that the map and description was signed by two of the commissioners. 1. It was expressly authorized by the act to be signed by the commissioners, or a majority of them. (*Laws of 1846*, p. 305, § 7.) 2. The presumption is that all assented to it, or that all were consulted, and conferred upon the subject, which would authorize a majority to act. (*Doughty v. Hope*, 3 *Denio*, 249. *Id.* 594. 8 *Wend.* 555.) Evidence of the declarations of Bellinger and Barckley, two of the commissioners, made after the alledged trespass, was properly excluded. They were competent witnesses if living; but if not, their declarations made after the transaction were no more than the declarations of any other persons would have been. The evidence would have been strictly hearsay testimony, and as such was properly excluded. (*Greenl. Ev.* §§ 99, 100, 123, 124.) The provisions of the re-

Smith *v.* Helmer.

vised statutes requiring commissioners of highways in certain cases to give the owner or occupant of the land through which a road shall have been laid, sixty days' notice in writing to remove his fences, is not made applicable to the proceedings of the commissioners under the act in question. Their powers are defined by, and directions for their conduct given in, the act under which the proceedings were had.

It is now well settled that the law under which the defendant justifies, not making the assessment and payment of damages a condition precedent to an entry upon and occupation of the premises for the purposes of the road, it is sufficient that the act makes provision for compensation to the owner, and the assessment and payment need not precede such entry and occupation. (*Bloodgood v. Mohawk and Hud. R. R. Co.* 18 *Wend. J. S. C.* 14 *Id.* 51. *Calking v. Baldwin*, 4 *Id.* 667. *Cole v. Trustees of Williamsburgh*, 10 *Id.* 659. *People v. Hayden*, 6 *Hill*, 359.) The owner of the premises may call upon the commissioners to assess and pay the damages as soon as the alteration is determined upon and the appropriation made; and if they refuse to make the assessment and payment they may be coerced, or perhaps they may be restrained from proceeding with the alteration until the damages shall be assessed and paid. But it is not necessary to decide this question. It is sufficient for this case that by the settled construction of the constitution which prohibits private property to be taken for public use without just compensation, actual compensation need not precede the appropriation, and that the law authorizing the reconstruction and alteration of the road in question provides for compensation, but does not make it a condition precedent to the entry upon and appropriation of premises for the purposes of the road.

I have thus gone through, at some length, the points made upon the trial, and upon which the plaintiff now relies. Some of them are unimportant, while others present questions worthy of consideration. Upon a careful review of the whole case, I think the rulings and decisions upon the trial, and the final disposition of the case, were right. 1. The act under which the defendant justified was properly in evidence. 2. It was consti-

Goldsmit v. Lewis County Bank.

tutional; for although it authorized the taking of private property for public purposes, it provided for a just compensation to the owner; and the assessment and payment of such compensation did not necessarily precede the entry upon and appropriation of the premises. 3. The premises in question were embraced within the provisions of the act, and the bill did not require the assent of two thirds of the members of the legislature, as a bill creating, altering or renewing a body politic or corporate. 4. The evidence established the fact that all the commissioners named in the act conferred together upon the subject matter of the alterations in question, and assented to them, and ordered and directed the alteration to be made; and that the defendant acted under their instructions, and by their directions. These are the principal questions presented by the bill of exceptions; and if I am right in my conclusions, the justification of the defendant was fully established. The other questions are unimportant; although as to them I think no error was committed upon the trial.

A new trial is denied.

•••

SAME TERM. *Before the same Justices.*

**GOLDSMID, President of the Bank of Watertown, vs. THE
LEWIS COUNTY BANK.**

The plaintiff, on the 20th of August, 1845, received from the defendant \$10,000 on account, but gave the defendant no credit for \$1500, parcel of that sum, although the plaintiff made use of the \$1500 soon after it was received. In an action by the plaintiff to recover the balance of an account claimed to be due from the defendant; *Held* that the *onlys* of accounting for the \$1500, and explaining how it was applied, lay upon the plaintiff; notwithstanding an account current of the dealings between the parties, produced by the plaintiff on the trial, which was silent as to the \$1500, was received in evidence by consent of the defendant's counsel, "subject however to explanation by witnesses on either side;" and it was agreed that said paper was "to be evidence on all points where it

Goldsmid v. Lewis County Bank.

was not contradicted by other testimony, and was not itself to be evidence wherein contradicted."

Held also, that under the agreement made upon the trial, the account current was only to be regarded as *prima facie* evidence as to all matters of account stated in it; that is, that the entries of advances and receipts of moneys stated therein were correctly charged; not that such account was to be deemed perfect, and as containing all the credits that should be allowed to the defendant.

MOTION to set aside report of referees. The facts are stated in the opinion of the court.

H. A. Foster, for the plaintiff.

S. Beardsley, for the defendants.

By the Court, GRIDLEY, J. This is a motion to set aside the report of three intelligent referees, who have found the sum of \$1872,72 due to the plaintiff from the defendants. We are all of the opinion that there should be a new trial. It is apparent that the merits of the cause have not yet been tried. That fact alone, however, furnishes no reason for a new trial, provided the fault rests with the defendants. But we think that the referees erred in the conclusion to which they came upon the facts proved. Their error probably consisted in holding that the *onus* lay upon the defendants to explain how the \$1500 (parcel of \$10,000 received by the plaintiff for the defendants) was applied.

The plaintiff proved an account against the defendants, amounting to \$51,341,09, and by the same balance sheet showed an account of the defendants, to offset, amounting to \$49,760,73. The great question in the case arose upon the omission of the Bank of Watertown to credit the defendants with \$1500, parcel of a sum of \$10,000 received from the latter on the 19th or 20th of August, 1845. This sum (\$1500) was nowhere credited on the account current presented by Mr. Angell, the plaintiff's witness; nor was it allowed by the referees. If it had been allowed, there would have been a small balance in favor of the defendants. The question now is whether it should not have been allowed upon the facts of the case as they stood proved on the trial. The following facts may be assumed as true from the

Goldsmith v. Lewis County Bank.

evidence contained in the report: 1. That if the defendants were entitled to be allowed the \$1500, the indebtedness would have been against the plaintiff. 2. That the Bank of Watertown received of the Lewis County Bank, on or about the 20th of August, \$10,000 in bills of the last named bank. 3. That the Bank of Watertown have given no credit to the Lewis Co. Bank for \$1500 parcel of this sum. 4. That Mr. Angell, the financial officer of the Bank of Watertown, made use of the \$1500 on the same or the next day after it was received.

This \$1500, as well as the rest of the \$10,000, was received by the Watertown Bank, and not by Mr. Angell in his individual capacity. That fact is sworn to by Mr. Angell in folio six of the report. This throws on the Bank of Watertown the burden of accounting for that sum. This has not been done, except in the following manner. The plaintiff's witness, Mr. Angell, produced a paper which is appended to the report and which purports to be an account current of the dealings of the parties, from a day prior to the receipt of the \$10,000, down to a period when their dealings closed. This paper was received in evidence by consent of the defendants' counsel, "subject however to explanation by witnesses on either side, and it was agreed by the respective counsel that the said paper is to be evidence on all points where it was not contradicted by other testimony, and was not itself to be evidence whenever contradicted." Now the paper containing the said account is silent as to this controverted sum of \$1500. And certainly it can not be the meaning of the indiscreet agreement which we have recited, that this paper was to be deemed *perfect*, and that it contained all the credits that should be allowed to the defendants. It is going far enough to regard it *prima facie* evidence as to all matters of account stated in it; that is, that the entries of advances and receipts of moneys stated in the paper were correctly charged. But in any point of view, the account is falsified—for we have seen that by the evidence of Mr. Angell himself, \$10,000 of the money of the defendants was received by the plaintiff on the 18th or 20th of August. It is no sufficient answer that Mr. Angell *swears* that the paper contains an account of all the trans-

Goldsamid v. Lewis County Bank.

actions between the banks that *he knows of*. It doubtless contained all that in his judgment ought to make part of the account. But he had just admitted the receipt of the \$1500, parcel of the \$10,000. Is it meant that the receipt of the \$1500 is not a transaction between the banks? If not between the banks, then there is no evidence that it was a transaction authorized by law. The Bank of Watertown received \$10,000 of the Bank of Lewis County, and had no right to appropriate \$1500 of it in an individual transaction, without the consent of those who owned the money. Any such use of the funds of the defendants would not relieve the Bank of Watertown from the liability of accounting for every dollar of the money. If, however, there was any such consent on the part of the Lewis County Bank, that fact should have been proved. And the burden lay on the plaintiff, who had received the money, and who was *prima facie* liable to account for it, to prove such consent.

It was upon this point that I think the error of the referees was committed. Evidence was given of an arrangement made a day or two before the receipt of the \$10,000 between the agents of the Lewis County Bank and the cashier of the Bank of Watertown, by which the Lewis County Bank was to advance \$10,000 of their bills to the Bank of Watertown, for the purpose of raising specie to meet a run upon the bank. Probably, to connect the actual receipt of the money with this arrangement, the defendants' counsel inquired of the witness "whether he received the \$10,000 under an understanding concluded at Martinsburgh at the time he went there with Bennett, and had the interview with Martin?" The witness did not answer the question put to him, but he replied in these words: "*I received instructions with the money.*" The plaintiff's counsel then asked the witness if such instructions were *written*; and *he said they were*.

Now, we think, if the Bank of Watertown relied on a consent or direction contained in written instructions from the Lewis County Bank, to dispose of the money sent in any other manner than in pursuance of the agreement to receive it to procure an advance of specie, it was for the plaintiff to show the instructions,

Ott v. Schroeppel.

and to prove that the money was applied in accordance with them. The great fact of having received the defendant's money without accounting for it, remained unexplained; and until explained, the plaintiff was liable to account for it. There is no evidence to show from whom the instructions emanated, nor what they were, nor that the money was disposed of in pursuance of them. Mr. Angell gives us no light on either of these points. And why this evidence was not given we can not tell. It is enough, however, that it *should* have been. We think, until this was done, the plaintiff was liable to account for the defendants' money, which was received on the 20th of August, 1845.

A new trial is granted; costs to abide the event.

SAME TERM. *Before the same Justices.*

OTT and others, adm'rs, &c. vs. SCHROEPPEL.

A bond of submission to arbitrators was subject to the following condition: "That if the above bounden H. W. S. shall well and truly submit to the decision of O. H. W., M. M., W. D. and J. G., or either three of them who shall act, named, elected, and chosen arbitrators, as well by and on the part and behalf of the said E. O. as of the said H. W. S., between whom a controversy exists, to hear all the proofs and allegations of and concerning, *First*, the amount which has actually been paid upon a certain contract between the said S. of the one part and the said E. O. and J. O. of the other part, of date March 1, 1835, and which in justice should be applied thereon; and indorse the amount so found on said contract, and *Second*, of and concerning also all actions, causes of action, controversies, suits, judgments, debts, dues, and demands, and all other matters of whatsoever name and nature now existing, &c. and *determine and settle*, and *award also*, upon said second mentioned matters, &c. so as the award of the said arbitrators be made in writing subscribed by them, or any two of them and attested by a subscribing witness ready to be delivered to the said parties on or before the 1st day of Feb. next, then," &c. Held that by the true interpretation of the bond, the parties intended to bind themselves to submit to the award of the arbitrators, of and concerning, *first* the amount that had been paid upon the contract mentioned, at the date of the

Ott v. Schroeppel.

submission, and *secondly* of and concerning all actions, demands, &c. That both subjects were submitted, to be awarded upon, and that the arbitrators were bound to embrace both in their award.

It is indispensable to the validity of an award made in pursuance of a submission containing the *ita quod* clause, that it should embrace all the subjects submitted. Although, upon a general submission of all demands, actions, &c. an award is conclusive as to all matters to which the submission extends, whether any particular included in the submission was or was not laid before the arbitrators, or passed upon by them; yet this principle does not extend to a case where a specific subject matter is submitted, in addition to a general submission of all demands.

Where, by a conditional submission, dated December 28, 1842, the parties submitted to arbitrators, among other things, the question how much had been paid upon a certain contract, *at the date of the submission*, and the award merely determined the amount which had been paid upon the contract up to the 1st of January, 1841; wholly omitting to find how much had been paid up to the date of the submission; *Held* that, by expressly limiting their finding to a time previous to the date of the submission, the arbitrators had precluded all ground for a presumption that they intended their award should embrace the intervening period; and that the award was void for the omission to include the whole period.

Held also, that the court could not *infer*, in aid of the award, that there were no payments made upon the contract during the time intermediate the 1st of January, 1841, and December 28, 1842, the date of the submission.

THIS was an action of debt brought by Edward Ott, in 1847, against the defendant, to recover the amount of an award in his favor, against the defendant. Edward Ott died in the progress of the suit, and the action was revived in favor of the present plaintiffs as his administrators. The declaration recited that on the 28th day of December, 1842, in Oswego, certain bonds of arbitration were mutually executed to each other, by the parties respectively, conditioned amongst other things that the parties, Ott on one side and Schroeppel on the other, "should well and truly submit to the decision of Orla H. Whitney, Mathew McNair, William Dalloway, and John Grant, jr. or either three of them who should act, named, selected, and chosen arbitrators, as well by and on the part and behalf of the said plaintiff, as of the said defendant, between whom a controversy existed, to hear all the proofs and allegations of the said parties, (amongst other things,) of and concerning all actions, causes of action, controversies, suits, judgments, debts,

Ott v. Schroepel.

dues, and demands, and all other matters of whatsoever name or nature, then existing between the said parties, including a suit then pending in the supreme court in which said Schroepel was plaintiff and Jacob H. Becher was defendant, and then noticed for the then present Oswego circuit, in which said Ott was interested, especially reserving from their consideration and determination the suit in slander, in Oswego common pleas, between said Ott and said Schroepel, in which Ott had recovered a verdict, and all matters relative thereto, and settle and award also upon said matters, so as the said award of the said arbitrators be made in writing, subscribed by them or any two of them, and attested by a subscribing witness, ready to be delivered to the said parties in difference on or before the first day of February, (1843,) then next. The declaration then averred that three of said arbitrators, Whitney, Dalloway and Grant, (McNair declining to act,) took upon themselves the burden of said arbitration and within the time appointed, to wit, on the 28th of January, 1843, did duly make and publish their award in writing, subscribed by two of said arbitrators, to wit, Grant and Dalloway, and attested by J. Neilson, a subscribing witness thereto, of and concerning the said matters in difference, ready to be delivered to the said parties in difference, and bearing date January 28th, 1843, and did thereby award and direct that the said defendant, Henry W. Schroepel, should pay or cause to be paid to the said plaintiff, Edward Ott, his heirs or assigns, the sum of five hundred and thirty-two dollars and sixty-nine cents, thirty days from the date of said award, with interest, which was to be in full payment and satisfaction of all debts, dues, and demands, which then were or had been in suit in any court, and also in full settlement, payment and satisfaction for and on account of any and all controversies, cause or causes of action, that might have existed or did then exist between the aforesaid parties, either in law or equity, saving and reserving however the slander suit in the Oswego common pleas, in which Ott had recovered a verdict against Schroepel, and which had not been in any way considered or involved by any consideration or determination in making their said award. The decla-

Ott v. Schroeppel.

ration then alledged the non-payment of the sum awarded with the interest or any portion thereof, in the common form, and claimed to recover the same in debt in this action. The second count of the declaration was an indebitatus count on the same award. The third count was for an account stated, in debt, claiming the amount of said award to be in arrear and unpaid.

The fourth count was an interest count in debt for interest on the same award. The first plea was *nil debet*, in the common form. The second plea alledged that the bond of submission also contained the following condition: that the arbitrators should "hear all the proofs and allegations of the parties of and concerning first, the amount which had been actually paid upon a certain contract between the said Schroeppel of the one part, and the said Edward Ott and Joseph Ott of the other part, of date March 1, 1835, and which in justice should be applied thereon, and indorse the amount so found on said contract," and secondly, of and concerning also all actions, &c. as stated in the condition recited in the first count of the plaintiffs' declaration. The plea then alledged that evidence was given to said arbitrators on the hearing, of payments actually made upon the contract mentioned in the condition of said arbitration bond, and the same was a matter of difference between the parties before the said arbitrators on said hearing and was duly submitted for their award thereon; but that the said arbitrators did not within the time limited make an award in writing, subscribed by them or any two of them and attested by a subscribing witness, ready to be delivered to the said parties, of the amount that had been paid upon the said contract. Wherefore he prayed judgment against the first count of the declaration. And for a further plea the defendant said in substance that although the said Dalloway and Grant did within the time subscribe the said award in writing with their own proper hands, and the same was attested by J. Neilson, a subscribing witness thereto, as stated in the plaintiffs' first count, yet that on the last day for the making of said award the said defendant requested the arbitrators to deliver the said award to him, the said defendant, but they neglected so to do; and the plea then prayed for judg-

Ott v. Schroeppel.

ment against the first count of the plaintiffs' declaration. The plaintiff put in a replication to the first special plea of the defendant, and averred that Orla H. Whitney, William Dalloway and John Grant, junior, within the time limited, did also duly make and publish their award in writing, subscribed by their own proper hands and attested by S. B. Ludlow as subscribing witness thereto, as to the signature of the said Dalloway and Grant, (two of said arbitrators,) of and concerning first the amount which had been actually paid upon the said contract of date March 1, 1835, and which in justice should be applied thereon; which said award in writing was indorsed on the said contract, specifying the amount so paid on said contract, ready to be delivered to the said parties in difference and bearing date January 28, 1843, by which they awarded and determined that the whole amount which had been paid actually on the said contract, amounted to the sum of five hundred and thirty dollars and sixty-two cents, of which the defendant had notice. The plaintiff also put in a replication to the last plea of the defendant, in which he averred that at the time the defendant requested the arbitrators to deliver him the said award there was due and unpaid to said arbitrators the sum of eighteen dollars for the reasonable charges in the matter of said arbitration, for their services in the premises, of which the defendant had notice; and that the arbitrators were then and there ready and willing and offered to deliver the said award to the said defendant, on payment of the said sum of eighteen dollars, as their reasonable charges therefor; without this that they neglected to deliver the same as stated by the defendant in his plea. The defendant put in a rejoinder to the plaintiffs' first replication, denying that the arbitrators made any such award as was stated by the plaintiff in his said replication. He also put in a rejoinder denying that eighteen dollars was due the arbitrators when the defendant requested them to deliver him the said award. The issues thus joined were tried before Justice Pratt at the Oswego circuit, in February, 1849. The plaintiffs' counsel presented in evidence and proved the bonds of submission as set forth in the declaration. And that an arbitration took

Ott v. Schroeppel.

place in pursuance thereof in January, 1843, before John Grant, jr. William Dalloway, and Orla H. Whitney, three of said arbitrators. That Mathew McNair, the other arbitrator named, was notified and declined to act. The plaintiffs' counsel then proved the award, which is in the words and figures following:

"To all to whom these presents shall come or may concern. William Dalloway and John Grant, jun. and O. H. Whitney, to whom was submitted as arbitrators the matters in controversy existing between Edward Ott and Henry W. Schroeppel, as by the condition of their mutual bonds or obligations executed by the said parties respectively, and sealed with their respective seals, dated the 28th day of December, 1842, more fully appear. Now therefore know ye, that we the arbitrators mentioned in the said bond, having heard the proofs and allegations of the parties and examined the matters in controversy by them submitted therein, do therefore make this award in writing, that is to say, the said Henry W. Schroeppel shall pay or cause to be paid to the said Edward Ott, his heirs or assigns, the sum of five hundred and thirty-two dollars and sixty-nine cents, thirty days from this date with interest, which is to be in full payment and satisfaction of all debts, dues and demands which now are or have been in suit in any court, and also in full settlement, payment and satisfaction for or on account of any and all controversies, cause or causes of action that may have existed or do now exist between the aforesaid parties, either in law or equity; saving and reserving, however, a certain suit in slander in the Oswego common pleas, in which the said Ott recovered a verdict against the said Schroeppel, and which has not been in any way considered or involved by any consideration or determination in making our award."

The plaintiff's counsel also produced and proved an instrument which he called an award, indorsed on the contract mentioned in the pleadings, of date March 1, 1835, in the words and figures following: "The whole amount which has been paid actually on the within contract up to the first day of January in the year 1841, is and by our award amounts to the sum of five

Ott v. Schroppel.

hundred and thirty dollars and sixty-two cents. Given under our signatures this 28th day of January, in the year 1843.

In presence of S. B. Ludlow, by John Grant, jun.
Wm. Dalloway. William Dalloway.
John Grant, jun. O. H. Whitney."

The plaintiff also proved that the award and the instrument indorsed on said written contract above set forth were made the day they bore date, and that duplicates were made, all of which were on that day, or the day after, deposited with S. B. Ludlow, to be delivered to the parties on payment of the balance of the arbitrators' fees. That the whole charge of the arbitrators was \$36, one half of which was paid in a check at the time of the arbitration—which check was delivered to the arbitrators by N. Soule for Schroeppel. That at the time of the arbitration it was understood by all the parties that the award was to be delivered to Judge Ludlow, to whom the balance of the fees were to be paid, and that the arbitrators delivered the award and contract in writing with the said instrument indorsed thereon, to him, Judge Ludlow, with directions not to deliver them or communicate the contents thereof without payment of the \$18, the balance due the arbitrators for their services. That some time after the first day of February, 1843, Judge Ludlow delivered up the award and instrument indorsed on said contract, on receiving the \$18, to D. H. Marsh, on behalf of Mr. Ott, which Marsh paid for Ott. The bond of arbitration and award and instrument indorsed on said contract were then read in evidence, and no other awards were proved.

The plaintiff's counsel proved the amount due on the award declared on, with interest, to be \$755.90. The defendant's counsel then moved for a nonsuit on the following grounds: 1. That the indorsement on the contract was not an award, within the submission, nor does it profess to be; for the arbitrators in the very instrument refer to the award as their authority to indorse. 2. If the indorsement was an award, then there were two awards made, and this the arbitrators had no authority to do. 3. That the award upon the Ott contract was not an award attested according to the bonds of submission. 4. That

Ott v. Schroepel.

the award was not a good and final award, as it did not find the amount which had been actually paid on the Ott contract, within the terms of the bond of submission. 5. That the arbitrators had no legal right to retain the award to compel the payment of the balance of their fees; but were bound to publish it and to deliver it to the defendant if demanded, on or after the day for publication and delivery mentioned in the submission. Which objections were overruled, and said motion was denied by the court; to which decision the defendant's counsel excepted. A verdict was taken for the plaintiff for \$755,90, subject to the opinion of the court, with liberty to either party to turn the same into a special verdict or bill of exceptions.

Le Roy Morgan, for the plaintiffs.

W. H. Sabin, for the defendant.

By the Court, GRIDLEY, J. This cause comes before us at this time upon a case subject to the opinion of the court. It has been before the court on two former occasions, upon demurrers; and we have been obliged to express an opinion upon several of the questions raised on this argument. It may be remarked however, that neither the entire bond of submission, nor the entire award has ever been spread out on the pleadings; and we have been compelled to give a construction to some parts of both as they were presented unconnected with the context, which may be found to differ somewhat from the interpretation demanded by a consideration of the instruments taken as a whole.

The bond of submission set forth in the case is subject to the following condition: "That if the above bounden H. W. Schroepel shall well and truly submit to the decision of Orla H. Whitney, Matthew McNair, William Dalloway and John Grant, jun. or either three of them, who shall act, named, elected and chosen arbitrators as well by and on the part and behalf of the said Edward Ott, as of the said Henry W. Schroepel, between whom a controversy exists, to hear all the proofs and allega-

Ott v. Schroeppel.

tions of and concerning, *First*, the amount which has actually been paid upon a certain contract between the said Schroeppel of the one part and the said Edward Ott and Joseph Ott of the other part, of date March 1st, 1835, and which in justice should be applied thereon; and indorse the amount so found on said contract—and *Second*, of and concerning also all actions, causes of action, controversies, suits, judgments, debts, dues and demands, and all other matters of whatsoever name and nature now existing,” &c. (“especially reserving,” &c.) “*and determine and settle and award also*, upon said second mentioned matters.” [Here follows a provision that the arbitrators shall be sworn; and then the bond proceeds in these words:] “*so as* the award of the said arbitrators be made in writing, subscribed by them or any two of them, and attested by a subscribing witness, ready to be delivered to the said parties on or before the 1st day of February next, then this obligation to be void,” &c. This bond is very awkwardly drawn, and it is by no means an easy task to give it a construction entirely satisfactory. The great question is whether the true interpretation of the instrument required the arbitrators to embrace in their award a determination of the amount that had been paid on the Ott contract up to the date of the bonds of submission, *and* to indorse such amount on the contract. The difficulty arises upon the point whether the condition to “submit to the decision of Orla H. Whitney” and the other arbitrators is to be read so as to require the parties to submit to the “decision” of the said arbitrators *of and concerning* the amount paid on the Ott contract, and also *of and concerning* all actions and demands, &c.; or whether it should be read as merely requiring the arbitrators “to hear all the proofs and allegations” of and concerning, *first*, the amount paid upon the said contract, and *secondly*, upon all actions, demands, &c. between the parties. The grammatical construction makes the phrase “*of and concerning*, &c.” refer to the hearing of the proofs and allegations, as its immediate antecedent. We have heretofore held, and upon an attentive consideration of the entire instrument we are still of the opinion, that the parties intended to bind themselves to submit to the “decision,” (in other

Ott *v.* Schrooppel.

words the *award*) of the arbitrators "of and concerning *first*, the amount actually paid, &c. and *secondly*, of and concerning also, all actions," &c. That both subjects were submitted to be awarded upon, and that the arbitrators were bound to embrace both in their award. Upon any other construction the word "*decision*" is without an object, and stands wholly unconnected with the rest of the instrument. There is nothing else to which it can relate. "*Decision*" of the arbitrators, we may ask, upon *what*? The answer is obviously "*of and concerning*" the subject matter of the submission. And though the awkward and inartificial manner of drawing the bonds has occasioned some difficulty in applying the "*decision*" of the arbitrators to the phrase of and concerning, the amount due upon the contract, according to strict grammatical rules; yet the undoubted meaning of the parties was to provide that they should submit to the "*decision*" of the arbitrators, "*of and concerning*" the subject matter of the submission; as well as to declare that the arbitrators were named and chosen to hear the proofs and allegations "*of and concerning*" the same subjects. This construction is confirmed by the language subsequently employed in another part of the instrument. After reciting the second subject matter of submission, which was general, of all demands, it seems to have occurred to the person who drafted the bond that the intention of the parties had not been clearly expressed: and he therefore adds, "And determine and settle and *award also* upon said second *mentioned matters*," clearly implying that the matter first mentioned had already been submitted as a subject of the award. By requiring the arbitrators to award "*also*" upon the second mentioned matter as well as the first, all doubt is removed in regard to the intentions of the parties that they should award upon *both*. Again; the bond requires the arbitrators to be sworn "*to make a just award*." The inquiry arises upon what were they to be sworn to make a just award? Upon one of the matters submitted? or upon the whole? Clearly upon the whole. Then follows the "*ita quod*" clause—"so as the award of the arbitrators be made," &c. We may again inquire, what was meant by the expression "*the award of the arbitrators*" in this

Ott v. Schroeppel.

clause? Undoubtedly, an award upon the whole matters submitted, as well that involving the determination of the amount that had been paid on the Ott contract as that concerning the general demands of the parties.

If I am right in my construction of the bonds of submission, then the award should have determined *how much* had been paid on the contract of March 1st, 1835, at the date of the submission. This was indispensable to the validity of an award made in pursuance of a submission containing the "*ita quod*" clause. This principle was most explicitly laid down in the case of *Randall v. Randall*, (7 *East*, 81, 83.) That case bore a strong analogy to the one under consideration; and Lord Ellenborough, in delivering the opinion of the court says, "The arbitrators had three things submitted to them; one was to determine all actions, &c. between the parties; another was to settle what was paid to the defendant, &c.; the third was to ascertain what rent was to be paid by the plaintiff to the defendant for certain land. The authority given to the arbitrators was conditional, '*ita quod*', they should arbitrate on the matters by a certain day. If then they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect; and here they have stopped short and have omitted to settle one of the subjects of difference which was stipulated for. This is not like the case where an award being good in part and bad in part, the good part shall not be vitiated by the arbitrators having directed something to be done which is superfluous and bad. But here the very condition on which the parties submitted to the award has failed." This decision was founded, among other authorities, on 1 *Roll. Abr.* 256; *Cro. Jac.* 836; *Willes*, 268; 8 *Coke*, 98, and 2 *Vern.* 200; and has been expressly recognized as sound law, and the principle re-asserted by Mr. Justice Spencer in *Jackson v. Ambler*, (14 *John.* 106,) and by Judge Nelson in 12 *Wend.* 159, as well as in many other cases. In *Randall v. Randall* the whole award was held void for the reason that the arbitrators stopped short and omitted to award upon one of the specific matters submitted to them. So this court held in this same case, (3 *Barb. Sup.*

Ott v. Schroeppel.

Court Rep. 60, 62,) that the award under consideration was void because the arbitrators stopped short, and omitted to award how much had been paid on the contract mentioned in the submission. This was so held upon two grounds; (1.) That the indorsement on the contract was not an award within the agreement of submission, and that it does not on its face profess to be, inasmuch as it alludes to the award as the authority for making the indorsement. When this case was before us on a demurrer to an amended replication, which the plaintiff had put in as a substitute for that which had been adjudged insufficient, we held that on the facts set forth in such amended replication the award was good.(a) But it was pleaded as an award, which upon a fair construction of the pleading determined how much had been paid on the aforesaid contract up to the date of the bond of submission. There was no objection on the face of the pleading to the award, except that in form it was executed and signed on two pieces of paper, which we held to be immaterial. We were however careful to confine our decision to a case corresponding with the facts stated in the amended replication, in these words: "We need not say that we are bound to take the facts, as they are pleaded, to be true; and the replication alleges a perfect award upon both subjects submitted." Upon an examination of the entire bonds of submission and of the award as the same are proved, it is very difficult to say that the principal award and the indorsement on the contract can be read together as one award in law, so as to satisfy the conditions of the bond of submission, which obviously contemplates one award upon both matters. We would not object to their being written in different instruments in point of form, for they might notwithstanding be read together. But it requires a great latitude of construction to read the indorsement on the contract as part of the principal award, when it does not profess to be an award on its face; and especially when it is attested by a different witness, and, by means of the attestation being confined to the signatures of two of the arbitrators, could by no possibility be the

(a) 4 Barb. *Sup. C. Rep.* 260.

Ott v. Schrooppel.

award of the three who executed the principal award. (*5 Page, 578, and cases there cited.*)

(2.) The award was held to be void on the ground that, conceding the indorsement could be read with the other award as a part of it, yet it only determined how much had been paid on the contract on the first day of January, 1841; wholly omitting to find how much had been paid up to the date of the bonds of submission, and by expressly limiting the finding to a day long previous, precluding all grounds for a presumption that they intended their award to embrace the two intervening years. We gave our reasons for holding that this indorsement was no compliance with the requirements of the submission, in the opinion before referred to. Our views on that point will be found at pages 61 and 62 of the 3d of Barbour, to which we desire merely to refer without repeating them here.

We deem it proper, however, to allude to one or two grounds put forth with much ingenuity by the plaintiffs' counsel on the present argument. He argued that the court would intend that there were no payments after January 1, 1841, and that Ott would be concluded by the award from insisting on any payments made after that date.

It is doubtless true that upon a general submission of all demands, actions, &c. an award is conclusive as to all matters to which the submission extends, whether any particular included in the submission, was or was not laid before the arbitrators or passed on by them. This is so settled in this state and in England. (*See 19 Wend. 285, and the cases cited by Bronson, J. in his opinion.*) And upon this doctrine upon a submission of all notes, bills, bonds, judgments, and demands, if the arbitrators should make a general award between the parties, neither party could thereafter recover upon a note by proving that it was not awarded on, or taken into consideration by the arbitrators. But this principle has never been extended to a case where a specific subject matter was submitted in addition to a general submission of all demands. By the second resolution in *Baspoole's case* in the 8th of Coke, it was resolved "that when the submission is general an award of part is good, for

Ott v. Schroepel.

otherwise the parties may conceal one thing and make the award void. But if it be of diverse things in special, *ita quod arbitrium fiat de permissis*, an award of *part* is *void*; but good without such conclusion." This is in strict accordance with the doctrine of *Randall v. Randall*, before cited. See to the same point, the remark of Spencer, J. (14 *John.* 106,) "that when there is a reference of two distinct matters of reference, and the arbitrators omit to decide one of such distinct matters, the whole award is vitiated." So too in *Warfield v. Holbrook*, (20 *Pick.* 531,) one of the cases cited by the plaintiffs' counsel, the distinction is taken by Ch. J. Shaw between the two classes of cases, declaring the general rule as it is admitted to exist, but adding that the law is otherwise where a matter is specifically submitted and the arbitrators omit to pass upon it; citing for this distinction the 1st of *Barnwell & Adolphus*, 723, and the 2d *Adolphus & Ellis*, 752, which fully sustain the ground assumed by the learned Ch. Justice.

Again. It is laid down in *Rolle's Ab. tit. Abr. b*, and it is held in *Karthans v. Ferris*, that in order to impeach an award made in pursuance of a conditional submission, on the ground of only part of the matters having been decided, the party must distinctly show that there are other points in difference of which the arbitrator had notice, and that he neglected to determine them. This principle can not help the plaintiff. The bond of arbitration in this case gave express notice to the arbitrators, that it was a point in difference, how much had been paid on the contract in question up to the date of the bonds, and the indorsement itself shows that evidence was given on the subject. That evidence would doubtless have warranted them in finding that no more than the sum indorsed had been paid on the contract up to the date of the bond. But they did not so find; and by expressly excluding from the period to which their finding was applicable, the time that intervened after the 1st of January, 1841, they say by the strongest implication, that as to that period they make no award. It is not, in our judgment, a case where we can make any intendment enlarging the language of an award so explicit in its terms. Nor

Wadsworth *v.* Thomas.

will Ott in any future litigation be concluded from proving any intervening payments, on the principle that being within the terms of a general submission, he was bound to prove such payments and obtain an award for them, or be thereafter concluded. There is no analogy between this case and the class of cases to which that rule is applicable. This is the conclusion to which the best consideration we have been able to give to this case has brought us. It is a case involving some new questions, and it must be admitted that it is not free from difficulty. We may have erred; but if we have, it is gratifying to know that our error will be corrected. Judgment must be entered for the defendant.

SAME TERM. *Before the same Justices.*

WADSWORTH *vs.* THOMAS.

A promise, made since the code of 1848 took effect, to pay a debt which was barred by the statute of limitations before the code went into operation, will not revive the cause of action, unless such promise be in writing, subscribed by the party to be charged thereby.

It is a general rule that statutes shall be construed to act prospectively, and not retrospectively. The meaning of the rule is that a statute is not to be construed to operate retrospectively, so as to take away a *vested right*.

The provisions of the 66th section of the code of 1848 have no application to the 90th section of the code, *it seems*. But if applicable they do not change its construction, or prevent it from applying to a case where the right of action accrued, and the action was commenced, after the code went into operation.

Van Rensselaer v. Livingstion, (12 Wend. 490,) commented upon, and distinguished from the present case.

THIS was an appeal, by the plaintiff, from a judgment for the costs of a nonsuit, ordered on the trial of the cause at the circuit. The complaint was served in Nov. 1848. It alledged that the defendant was indebted to the plaintiff as maker of two promissory notes, one bearing date Jan. 1st, 1836, and the other July 6, 1836. It alledged a demand of the amounts due on

Wadsworth v. Thomas.

each, on the 26th day of August, 1836, and at divers other days and times between that time and the commencement of this action; and that the defendant had frequently promised to pay the same, and had so promised within six years next before the commencement of this action, yet had not paid, except the amounts named in the indorsements. The answer denied that the defendant was indebted to the plaintiff, as maker of the notes, or in any respect whatever. It alledged payment of the notes more than six years since; and stated that the defendant could not answer in regard to demand of payment. It denied any promise to pay within six years next before the commencement of this action, and alledged that the notes were given more than six years before suit. The reply denied payment, as alledged in the answer; and alledged that the defendant had promised to pay within the last six years before suit, and alledged a promise on or about the 30th day of August, 1848. The facts proved upon the trial are sufficiently stated in the opinion of the court. At the close of the plaintiff's testimony the defendant's counsel moved for a nonsuit on the ground that the acknowledgment and new promise were not in writing subscribed by the party to be charged thereby, as required by the 90th section of the code of procedure. To this the plaintiff's counsel objected, and insisted that said 90th section was prospective and not retrospective in its operation, and besides, that section 66 of the code of procedure rendered section 90 inapplicable to the plaintiff's right of action in this suit, said right having accrued before the code of procedure went into operation. The judge granted the motion for a nonsuit, and directed the entry of a judgment for costs; and the plaintiff excepted.

B. F. Rexford, for the plaintiff.

J. Ruger, for the defendant.

By the Court, GRIDLEY, J. This action is brought upon two notes made by the defendant; the one bearing date on the first of January, and the other on the fifth of July, 1836. Both were

Wadsworth *v.* Thomas.

payable on demand, and the last indorsement bore date on the twenty-sixth of August in the same year; so that the statute of limitations attached in August, 1842. It was urged on the argument by the plaintiff's counsel, that from certain allegations in the complaint, not denied in the answer, it appeared that there had been frequent promises to pay, on the part of the defendant, made at such times as to prevent the statute from attaching at all. The averment in the complaint, relied on, consisted in an allegation that on the 26th day of August, 1836, and on divers other days and times between then and the commencement of the action, payment had been demanded, and that the defendant had frequently promised to pay the notes, and had promised to pay the same within six years next before the commencement of the suit. The answer stated that the defendant did not recollect whether payment had ever been demanded or not, but absolutely denied any promise to pay, within six years next before the commencement of the action. Now, the answer admits no demand of the notes; but it leaves unanswered so much of the complaint as stated that the defendant had frequently promised to pay between the 26th of August, 1836, and a point of time six years before the commencement of the suit, which was on the 16th day of November, 1848. If this, then, is a material allegation, it is admitted that the defendant, at divers times and places, between the 26th day of August, 1836, and the 16th day of November, 1842, frequently promised to pay the notes. But at what particular times between these two periods he thus promised is not averred, and does not appear. Now the averment would be satisfied by supposing the promises to have been made in 1836 after the 26th of August, in 1837, 1838, 1839, 1840, or 1841. And there is nothing to show that any were made after that time. In truth, for aught that appears in the complaint, they may have been made within the first year after the 26th of August, 1836. Upon the facts, therefore, as proved by evidence and admitted by the pleadings, the statute of limitations had attached when the code of 1848 took effect as a law. After that, and on the 30th of August, 1848, the defendant promised to pay the notes. But

Wadsworth *v.* Thomas.

this promise was not in writing, and the defendant insists that within the principle of the 90th section of the code a verbal promise does not revive the cause of action. Upon these facts, two questions are presented for our consideration.

1. Whether, upon the true construction of section 90, irrespective of the saving clause contained in the 66th section of the code, the cause of action was revived. The section reads as follows: "Where the time for commencing an action arising on contract shall have expired, the cause of action shall not be deemed revived by an acknowledgment or new promise, unless the same be in writing subscribed by the party to be charged thereby." It is contended by the counsel of the plaintiff that the new promise in this case is not within the foregoing enactment, upon the ground that statutes are always to be construed to act prospectively and not retrospectively. There can be no doubt that this proposition, when rightly understood, is sound law. The meaning of it is that a statute is not to be construed to operate *retrospectively* so as to take away a *vested right*. The rule is so expounded in all the cases cited by the counsel. (See 7 *John.* 501; 12 *Wend.* 490; 8 *Id.* 661; 5 *Hill*, 408; 1 *Denio*, 128; 10 *Wend.* 104; *Id.* 363.) To bring the case within this rule, thus explained, the new promise should have been made before the code took effect as a law. Then upon the law as it existed when the code went into operation, the plaintiff would have had a vested right of action, to recover the amount of the notes; but, there having been no recognition of the demand, or promise to pay, within six years next before the time when the code became a law, there was no existing vested right. It had been taken away by the statute, and had not been restored by a new promise. And therefore the act was strictly prospective in its operation. It had respect to the manner in which a right of action might be revived. The plaintiff lost no *existing* right by the act, but was merely prevented from acquiring one thereafter, except in the manner pointed out in the act. It is true that the *opinion* delivered by Justice Sutherland in *Van Rensselaer v. Livingston*, (12 *Wend.* 490,) upon a superficial reading, seems to carry the doctrine a little farther

Wadsworth v. Thomas.

than the rule above laid down. But the law itself warrants no such conclusion. The question arose upon the construction of a provision of the revised statutes, (2 R. S. 301, § 48,) by which it was enacted, that payment should be presumed upon a sealed instrument after the expiration of twenty years from the accruing of the right of action, unless rebutted by a partial payment or by a *written acknowledgment*. The plaintiff proved a verbal promise long before the act was passed; and the court held that the act could not be construed retrospectively, so as to defeat a right of action which had been revived or continued and was existing in full force when the act took effect. It was precisely such a case as this would have been had the new promise been made *before* instead of *after* the time when the code took effect as a law. The decision in *Warner v. Griswold*, (8 Wend. 661,) is, in principle, the same. There is a great variety of cases which show that the rule of construction now in question can not apply to a case like this. (See 10 Wend. 365; *Id.* 104; 17 *Id.* 329; 2 *Hill*, 238; 5 *Id.* 409; 1 *Id.* 324. See also 1 *Kent's Com.* 455, 6; *Id.* 408, 9, 2d ed.)

II. The next question to be considered is, whether the 66th section of the code excludes the provision contained in the 90th section from any application to the case under consideration. The language of the 66th section is as follows: "This title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form."

(1.) Section 90 is certainly a part of the title mentioned in the 66th section; and yet it is very doubtful whether it is so, within the spirit and true meaning of the enactment. The fact that it is within the *words* of the enactment, literally interpreted, is not conclusive upon this point. "The real intention, when accurately ascertained, will always prevail over the literal sense of the terms." (1 *Kent's Com.* 462.) "*Qui, haeret in litera, haeret in cortice*," is a maxim venerable for its antiquity. The title spoken of treats "of the time of commencing actions," and is intended as a substitute for the old statute of limitations.

Wadsworth v. Thomas.

When it was decided that the forms of actions should be abolished, it became necessary to restrict this statute; for the provisions of the old act limited actions by name, as debt, assumpsit, case, &c. And in the reconstruction of this part of the statute some other changes were made in the times limited for the commencement of certain actions. It was probably these limitations of time which the framers of the act intended should not apply to actions already commenced, or to cases wherein the right of action had already accrued. The provision is analogous to that contained in the 45th section of the act entitled "Of the time of commencing actions," in the revised statutes. (2 R. S. 300, § 45.) Such was the application of that section, as appears from the cases of *Van Hook v. Whitlock*, (3 Paige, 416,) and *Fairbanks v. Wood*, (17 Wend. 329, explained in 2 Hill, 238, and 5 Id. 408.) We think, too, that the concluding words of the section in question point with great significance to the class of enactments which the section was intended to embrace. When it is said that "the statute now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form," what else is meant but that the statutes which now limit actions of assault and battery to four years, and actions of assumpsit to six, shall continue applicable to the subjects of those actions, (notwithstanding the names and forms of action are abolished,) in all cases, where the right of action had accrued? Again; the enactment applies to such matters only as are now regulated by statute, declaring that the new statute shall not apply; but that the old ones shall. Now section 90 is a provision entirely *new*. It is not a substitute for any former enactment existing when the code took effect. It would seem to me, for these reasons, to be the better opinion that the provisions of section 66 have no application to section 90. *But*

(2d.) If these provisions *are* applicable to the 90th section, we do not perceive that they change its construction, or prevent its application to the facts of this case. This was not a case in which the *action was commenced* when the act took effect, like the case of *Dash v. Van Kleeck*, (7 John. 501;) nor where the

Wadsworth *v.* Thomas.

right of action had already accrued, like the case of *Van Rensselaer v. Livingston*, (12 *Wend.* 490.) In both these cases it was held that the statute should be construed to act prospectively and not retrospectively so as to effect a vested right. The object of the provision contained in section 66 was to prevent by direct prohibition the application of any of the new enactments in violation of the principles established in those cases. I have said that this was not a case in which the right of action had already accrued. By this I mean the right of action that would have been revived and would have accrued had the provision contained in section 90 not been enacted. Any other construction of this phrase, as applied to the provisions of section 90, would be senseless. Nor can the construction depend on the fact whether the recovery, in the case of a new promise, is upon the new promise, or upon the original cause of action. To test the question of interpretation, we may suppose the words of the 66th section to follow and make a part of the 90th section, thus—"But this section shall not extend to actions already commenced, or to cases where the right of action has already accrued." The meaning would thus be plain. The section would not have extended to this case provided the plaintiff had already commenced his suit; nor would it, if the cause of action had already accrued by the making of a new promise before the code went into operation, although no suit had then been commenced. Such, we are satisfied, is the true reading of these enactments.

The judgment must be affirmed.

SAME TERM. *Before the same Justices.*

FRENCH *vs.* KENNEDY.

Where a bond and mortgage, bearing date March 18, 1831, were conditioned to pay "the just and full sum of \$1256.50, with interest after the first day of April next, in fourteen equal annual payments on the first day of April of each and every year after the first day of next April;" Held that the true reading of the condition was that the obligor should pay \$1256.50 in 14 equal annual instalments, such instalments to be paid on the first day of April in each year, &c. with interest, &c.; the meaning of which was that the interest on each instalment should be paid when the instalment became due, and not before.

When partial payments are made on a bond or other obligation, after the money has become due and payable by the terms of the instrument, the day on which the payment was to be made is to be disregarded, in the computation of interest. The rests are to be made at the times when the payments are *actually* made; unless the payment should fall short of the interest then due, in which case the rest is to be made when the first payment is received which, taken with the previous smaller ones, in the aggregate, exceeds the amount of interest due at the time.

In the case of an over-payment, which becomes a partial *ante-payment*, with respect to future instalments, the amount of such over-payment should be immediately applied to the principal and interest to become due on the next annual pay day; leaving the interest to be computed on the balance.

THIS was an appeal, by the defendant, from a judgment entered upon the report of a referee. The complaint was filed for the purpose of having a bond and mortgage executed by the plaintiff on the 18th of March, 1831, to one Luther Colton, surrendered and cancelled, on the ground that the whole amount due thereon had been paid, or tendered, by the plaintiff. The defendant Kennedy was the assignee of the mortgage. The condition of the bond was that the obligor should pay to the obligee the "just and full sum of \$1256.50, with interest after the first day of April next, in fourteen equal annual payments on the first day of April of each and every year after the first day of April next." The plaintiff set forth, in his complaint, various payments made by him, upon the bond and mortgage, from time to time, and alledged that according to the rule of computation which he had adopted, and which he insisted was

French v. Kennedy.

the correct one, there was due to the defendant on the 15th day of May, 1848, a sum not to exceed \$15, and that on that day he tendered that sum to him in full payment of the bond and mortgage, and requested him to execute a discharge thereof, but that he refused to receive the money or to execute a discharge. The plaintiff insisted that he was not bound to pay annual interest upon the sum secured by the bond and mortgage, but was to pay simple interest only, and to pay the interest upon each instalment as it became due and payable, from the first day of April, 1831. The defendant, by his answer, admitted the making of the several payments by the plaintiff, as stated in the complaint, and the tendering of the \$15 by the plaintiff as alledged by him. And the defendant admitted that he refused to accept such tender, or to execute a discharge of the bond and mortgage, for the reason that he claimed there was a much larger sum due thereon than the amount tendered. And he averred that by a legal computation made of the amount due upon the bond and mortgage, there still remained due thereon the sum of \$375.07 or thereabouts. And he claimed that he was entitled to recover the interest upon the whole sum secured to be paid by the said mortgage, to be computed from the said first day of April, 1831, up to the time when the payments made should exceed the amount of the interest which had accrued thereon; that the interest should then be added to the principal sum, the payment or payments thereon deducted from the gross amount of principal and interest; the balance forming a new principal upon which to compute the interest, and he claimed that the above was the legal way to compute the interest, upon the said mortgage.

On the hearing before the referee the plaintiff proved by Joseph F. Sabine that by a computation of the interest on said bond and mortgage, on the principle claimed by the plaintiff to be correct, there remained due on the 15th day of April, 1848, \$11.49. It was admitted that a much larger sum, to wit, several hundred dollars, was due on said bond upon a computation of interest made on the principle claimed by the defendant in his answer.

French *v.* Kennedy.

The referee came to the conclusion that the words "14 equal annual instalments," in the condition of the bond, referred to the principal, and not the interest; leaving the terms of the payment of interest not especially defined, and decided that in such a case the payment should carry the interest. He accordingly made a computation showing that, upon this principle, there was, at the time the tender was made, less than \$15 due upon the bond and mortgage. And he reported that the plaintiff was entitled to the relief prayed for in the complaint. Judgment was entered upon this report, and the defendant appealed.

D. D. Hillis, for the plaintiff.

Geo. N. Kennedy, defendant, in person.

By the Court, GRIDLEY, J. The defendant below, and appellant here, is the holder, by assignment, of a bond and mortgage executed by the respondent French, bearing date the 18th of March, 1831, conditioned to pay the just and full sum of "\$1256,50, with interest after the first day of April next, in fourteen equal annual payments on the first day of April of each and every year after the first day of next April." The respondent filed his complaint upon the ground that he had paid and tendered the entire sum due on the above securities, and prays for a judgment that they be surrendered and cancelled. Upon the argument two questions become material. 1st. Whether by the terms of the bond annual interest on all sums unpaid is recoverable, or whether the interest on each instalment is payable at the same time with the instalment; and 2dly. Whether, upon the principle last stated, by the legal mode of computation of interest, the amount paid and tendered on the mortgage was sufficient to pay the debt due thereon.

I. Upon the first question we are of opinion that the interest upon each instalment falls due when the instalment is payable, and not before. Interest is not payable before the principal on which it accrues, unless there be a special agreement to that effect. Here there is no such agreement. It is provided that

French *v.* Kennedy.

the instalments shall bear interest after a certain day, but it is not stipulated that such interest shall be paid before the instalments respectively fall due. It would be a most unusual construction to hold that the word instalments should apply to the interest as well as the principal; and the appellant does not contend for such a construction. The true reading of the condition of the bond is, that the obligor shall pay \$1256,50 in fourteen equal annual instalments, such instalments to be paid on the first day of April in each and every year, &c. *with interest*, &c. The meaning of which is that the interest on each instalment shall be paid, when the instalment becomes due. The language of the instrument is not fairly susceptible of any other interpretation.

II. The second question involves the correctness of the mode of computing partial and overpayments adopted by the referee. The referee has struck balances on the first of April in each year, which has compelled him to compute interest on the payments made by the obligor. There have been some overpayments, and interest has been computed on them, and the aggregate amount applied to the amount due and payable on the next annual pay day. The appellant insists that this mode of computation is erroneous—that the true rule is, in the case of partial payments, to compute interest up to the time of the payment which either alone or with the prior payments, exceeds the interest due, making no rest at the annual pay day, unless such payment was made thereon; and that in the case of overpayments the amount of such overpayment should be immediately applied to the principal and interest to become due on the next succeeding annual pay day, leaving the interest to be computed on the balance.

In the case of partial payments the rule was laid down in the case of *Connecticut v. Jackson*, (1 *John. Ch. Rep.* 17,) in these words: "The rule for casting interest when partial payments have been made is to apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of prin-

French *v.* Kennedy.

cipal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due; and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of principal as aforesaid." The like rule is laid down in nearly the same words by the judges of the supreme court as a direction to their clerks in the computation of interest. (See 3 Cowen, 87, note a.) The same rule prevails in Massachusetts. (4 Mass. Rep. 103. 17 *Id.* 417. 1 *Pick.* 194. See also the rule laid down in *Walsh's Arithmetic, with an illustration*; 2 Cowen's *Tr.* 1005, 1006; see also *Perkins' Arithmetic*, 134 to 136.)

It seems, therefore, to be settled in this state that when partial payments are made on a bond or other obligation, after the money has become due and payable by the terms of the instrument, the day on which the payment was to be made is disregarded in the computation of interest. The rests are made at the times when the payments are *actually* made; unless any should fall short of the interest then due, in which case the rest is made when the first payment, which, taken with the previous smaller ones, in the aggregate, exceed the amount of interest due at the time, is made. The mode of computing the interest in this case is, therefore, in this respect, erroneous.

In the case of an overpayment, which becomes a partial *ante-payment*, with respect to future instalments, the rule is settled as the appellant insists it should be, in *Williams v. Houghtaling*, (3 Cowen, 86.) This is a different rule from that laid down in *Tracy v. Wikoff*, (1 *Dallas*, 124,) but it is an adjudication expressly in point, from our own reports, and we are bound to follow it, though it will generally be more difficult of application than it was in the case cited. By this rule the *ante-payment* is to be applied to a portion of the future instalment and the interest on that portion.

It will follow that the sum tendered may be found insufficient to pay up the amount remaining due and payable on the securities in question. Therefore the judgment must be reversed,

Manning *v.* Johnson.

and the cause be referred back to the referee to make a new report, adopting the principle of computation above laid down, unless the parties agree upon the amount.

Judgment accordingly.

SAME TERM. *Before the same Justices.*

MANNING *vs.* JOHNSON.

To give a justice jurisdiction, and to authorize him to render judgment against an absent defendant, there must be a *return* showing *personal service of process*.

An entry in a justice's docket, as follows, "Sept 1 Sums 2 pers by S. B. Ward Const 11 plf appears" &c. furnishes no evidence of the service of a summons upon the defendant.

THIS was an appeal from the county court of Onondaga county. The cause was originally commenced in December, 1848, before a justice, by summons duly served and returned. The parties appeared and joined issue, and on the 1st of January, 1849, the cause was tried, and judgment was rendered by the justice, in favor of the plaintiff, for \$41,78 damages, and \$1,32 costs. An appeal was taken, to the county court, and the judgment of the justice was reversed and a new trial ordered, pursuant to the code. On the 1st day of February, 1849, the same justice issued a summons requiring the defendant "to appear for the new trial of this action, pursuant to the order of the county judge of Onondaga county, made in said cause," at his office, on the 8th of February. On the return day the parties appeared before the justice, and the defendant objected that the summons should be quashed or set aside, because, 1st. It did not appear that at the issuing thereof a new trial had been granted; 2. That it did not appear that any such new trial had been granted at all; 3. That there was no evidence, at the issuing of the summons, or on the return day thereof, that a new trial

Manning v. Johnson.

had been granted. The justice thereupon stated that he could not take judicial notice of a new trial being granted, without some proof to that effect. The plaintiff thereupon produced the judgment roll upon the appeal, together with the opinion of the county judge, showing that the judgment of the justice was reversed by the appellate court, with costs, and a new trial ordered to be had, before the same justice. The defendant renewed his objections, and further claimed that from the testimony it appeared that the judgment was one of reversal, and that the order for a new trial was a nullity: that the power of the judge was spent on reversing the judgment, and that the judge could not join a judgment of reversal with such an order. The court overruled the motion and objection. The cause was then adjourned to the 4th day of May then next, at which time the parties again appeared before the justice, and the cause was then further adjourned to the 5th day of May, then instant, at which time the parties appeared, and the cause proceeded to trial upon the pleadings on which the cause was originally tried, to wit: the complaint was upon a judgment duly rendered by John H. Johnson, a justice of the peace of the county of Onondaga, for \$30,73 damages and costs, Sept. 18, 1843, against the defendant, and in favor of the plaintiff. The defendant, by his answer, denied that any such judgment as was mentioned in the complaint was ever duly rendered, given or made, and denied any allegation to the contrary of that in the plaintiff's complaint. The defendant alledged that the action was not prosecuted in the name of the real party in interest, but that one Daniel Benedict was the real plaintiff in interest. That said Daniel Benedict was the owner of said judgment, and not the person named as plaintiff; and the defendant averred that he was not within the jurisdiction of the justice by whom the said supposed judgment was given at the commencement of the suit in which said judgment was given. That no process for the commencement of said suit was ever served upon him, nor had he any day in court before the said justice, nor any opportunity of interposing his defence to said suit. The defendant also alledged an indebtedness to him by the plaintiff and claimed to set off

Manning v. Johnson.

the same. He also stated that no new trial had been granted in the action. The plaintiff denied said answer, and the cause proceeded to trial. The plaintiff called as a witness John H. Johnson, who testified that on the 1st day of September, 1843, he was a justice of the peace of the county of Onondaga, and some time before then, and thereupon he produced a manuscript book of entries and containing entries relative to the judgment referred to in the complaint in this cause, and testified that it was his docket; that he kept a docket at that time, the one produced; that an entry was made in his book in the words and figures following:

"Franklin Manning vs. Quincey A. Johnson.

Sept 1 Sums 2 pers by S. B. Ward Const 11 plff appears
declares on note Adj. to 18th inst. 1 P. M.

18 S. E. Kingsley sworn, and judgment for plff

Damages,	\$29 70
Costs,	1 03
1846, Dec. 5. Trans.	<hr/> 30 73"

The above was all that appeared in the docket. Johnson further testified that Ward was a constable of said county at the time of the commencement of the said suit last mentioned, that said docket was kept by him, witness, and hereupon the plaintiff's counsel asked the witness the question following: "Was a suit commenced before you by the plaintiff against the defendant, as appears by your docket?" Objected to by the defendant's counsel, and objection overruled. The said Johnson then turned to his docket, and the entries hereinbefore stated, and read the same in evidence from said book, and testified that on the 1st day of September, 1843, Ward was constable; that witness knew nothing of the proceedings in the case, or the judgment, and had no recollection concerning them; that what appeared on his docket was all he knew about them; that he recollects nothing of them independent of his docket. Here the plaintiff offered the docket in evidence, which was objected to by the defendants, the objection overruled, and the docket was read in evidence. The testimony being closed, the defendant moved for a nonsuit, on the ground that the plaintiff had not

Manning v. Johnson.

made out a case entitling him to recover. The cause was then submitted to the justice, and on the 8th day of May, 1849, he rendered a judgment in favor of the plaintiff for \$42,45 damages, and \$2,40 costs. The defendant appealed to the county court, and that court affirmed the judgment. The defendant then appealed to this court.

R. H. Gardner, for the plaintiff.

Le Roy Morgan, for the defendant.

By the Court, GRIDLEY, J. We are of opinion that it sufficiently appeared before the justice that a new trial had been granted by the county court. The judgment record and the opinion of that court, by which it appeared that the judgment below had been reversed and a new trial awarded was enough for the justice to act upon. The objection that if the county court reversed the judgment it could not grant a new trial, was too technical. It is true that the code does not treat an order for a new trial as involving the reversal of the judgment below; but it does that substantially; and the justice was right in disregarding the objection.

The important question upon this appeal is whether the justice who tried the cause wherein the judgment was rendered upon which the present action was brought ever acquired jurisdiction over the person of the defendant.

The declaration before the justice was founded on a judgment rendered in a justice's court, and under sections 138 and 57 of the code merely alledged that the judgment was *duely rendered*, without setting forth any fact to show the jurisdiction of the justice. This allegation was controverted in the answer; which made it the duty of the plaintiff to prove the facts conferring jurisdiction, under the provision of the said 138th section of the code of procedure. In addition to this, the defendant in his answer denied in all possible forms any service of process, or any appearance by him, in the suit in which the judgment was obtained.

Manning v. Johnson.

Now under this issue we will not say that the judgment would be void, in consequence of the omission of the officer to serve process on the defendant, provided there was no collusion between the officer and the plaintiff, and no fraud on the part of the latter. (See *Putnam v. Man*, 3 *Wend.* 202.) But there must have been a *return of personal service* before the magistrate to authorize him to proceed in the cause and render judgment against an absent defendant. (19 *Wend.* 477. 3 *Id.* 202. 14 *John.* 481. 7 *Hill*, 39.) The question here, is whether there is any legal evidence of such a return, or of the actual service of the summons. We think there was not. The docket of the justice was the only evidence of those facts; and the following is the only entry which has any relation to the point in question. "*Sept 1. Sums 2 pers by S. B. Ward Const 11 plff appears,*" &c. It can not be maintained that this entry furnishes any evidence of the service of a summons. There are, not only, no words that can be so read, but there are no abbreviations which, by filling up, would bear such a construction, upon the most liberal intendment, in favor of the docket. The court extended the rule of intendment and construction to the very verge in the case of *Graff v. Griswold*, (1 *Denio*, 432.) There, however, it was only required to fill up the abbreviations in order to make out a return of personal service. But, here, it would be necessary to supply material abbreviations, as well as to fill them up. The entry in the docket can not be read so as to show that there was a return of the constable stating that he had personally served the summons on the defendant. Even if it were competent to supply the defect by calling the justice to explain what he meant by the memoranda read from the docket. *That* was not done. There was nothing but the bare words and figures, which we have extracted from the docket, to prove to the court below the important fact on which the jurisdiction of the justice depended; a fact which was distinctly put in issue, and which was capable of proof (if indeed the fact existed) by the production of the summons, or if that had been lost, by the oath of the constable. The docket, it must be remembered, is documentary evidence, and should be sufficient on its face, to prove the

The People *v.* Powers.

fact which it is designed to establish by it. To admit evidence of so loose a character as the entry in question, to prove a fact so important, would be most dangerous. We are bound therefore to correct this error. The judgment of the county court, and of the justice, must be reversed ; and we also order a new trial before the justice who tried the cause, under the authority conferred by the 330th section of the code.

SAME TERM. *Before the same Justices.*THE PEOPLE *vs.* EMERSON POWERS.

A certificate of conviction, in the form directed by the statute, and which was filed in the clerk's office within the prescribed time, is competent evidence of the facts stated therein ; although it does not contain evidence that the court had obtained jurisdiction over the person of the prisoner.

Such a certificate, being made evidence, by statute, of the facts contained in it, can not be contradicted by parol evidence showing that there was in fact no trial and conviction.

Yet *it seems* that a party may so far contradict a record of conviction by a court of inferior jurisdiction, as to prove that the court had no jurisdiction of the offence, or of the person of the prisoner.

THE defendant was indicted for a second offence of petit larceny. The indictment contained but one count. It charged the first conviction to have occurred on the 31st of October, 1848, at a court of special sessions held at Syracuse before Wm. A. Cook, police justice, having full power and authority to hold said court, and to try and convict for such offence. And that the defendant, (who was tried by the name of Amison Powers,) was sentenced to pay a fine of five dollars ; and that he paid the same, and was discharged. On the trial, at the Onondaga oyer and terminer, the district attorney offered in evidence the following certificate of conviction, after proving by

The People *v.* Powers.

the county clerk that it came from the files in his office, and was in Cook's hand-writing ; and that Cook was dead.

“Onondaga County, Syracuse Police Office, ss. At a court of special sessions this day held in the town of Salina, before the undersigned, police justice of the village of Syracuse, in said county : Amison Powers was convicted of having on the 30th day of Oct. instant, feloniously taken and carried away one pair of pantaloons, of the value of seven dollars, the property of Samuel P. Dewey and Alexander Thompson, at Salina aforesaid, and upon such conviction I did adjudge that the said Amison Powers should pay a fine of five dollars and stand committed until paid, which was paid to the undersigned and defendant discharged from custody. Given under my hand the 31st day of October, 1846.

WILLIAM A. COOK,

Indorsed “filed Nov. 16, 1846.” Police Justice.”

The defendant's counsel objected to the reception of this certificate in evidence, but the court overruled the objection and received the certificate. The defendant's counsel offered to prove that on the evening of the prisoner's arrest, upon the complaint before the police justice he was committed for trial, and not as a person convicted ; that the next morning he was brought before the police justice, and denied the charge of stealing ; that he was not tried ; that he settled with the owners of the property, and was dismissed without payment of a fine. This evidence was objected to, as going to impeach the record or certificate of conviction, and was rejected by the court ; and the prisoner's counsel excepted to the decision. The prisoner was convicted by the jury ; and filed a bill of exceptions and moved for a new trial.

H. Sheldon, (district attorney,) for the people.

C. B. Sedgwick, for the prisoner.

By the Court, GRIDLEY, J. The prisoner was convicted of a second offence of petit larceny at the oyer and terminer in Onondaga county. On the trial a bill of exceptions was taken

The People *v.* Powers.

to the ruling of the court, on the admission of certain evidence offered by the district attorney and in the rejection of evidence offered on behalf of the prisoner. As a part of the proof to sustain the indictment the counsel of the people offered in evidence a certificate of the conviction of the prisoner, (whose identity was proved by other evidence,) under the name of Amison Powers, of the offence of petit larceny, in stealing a pair of pantaloons of the value of seven dollars, on the 30th of October, 1846. The certificate was signed by Wm. A. Cook, police justice at Syracuse, and was indorsed "filed Nov. 16, 1846," and was proved to be in the hand-writing of Justice Cook, who is since deceased; and was filed by the deputy clerk of the county, as he testified, at the time of its date. To this evidence the counsel for the prisoner objected, without stating the ground of objection. The objection was overruled, and the evidence was received. The objection now made to the admission of the certificate is, that it does not show that the court had jurisdiction of the person of the prisoner. And we are referred to the case of *The People v. Koeber*, (7 Hill, 39,) and to note on page 37 of the same book, and to several other authorities, showing the necessity of proving the jurisdiction of an inferior tribunal, in order to sustain its judgment. It was not disputed that the police justice had jurisdiction to hold a court of special sessions, under the provisions of the act of May 13th, 1840, (*Laws of 1840*, p. 219;) and the 16th section of the act of May 10, 1845, (*Laws of 1845*, p. 186,) but it was contended that the certificate should contain evidence that the court had obtained jurisdiction over the person of the prisoner.

The question does not arise, whether the certificate was *itself sufficient*, without further evidence, to prove the jurisdiction of the court, but simply whether the certificate was *competent* evidence. And upon that point we think that there can be no doubt. It was in the precise form directed by the statute, and was filed within the prescribed time. (2 R. S. 717, §§ 38, 39.) And section 40 of the same act declares that "any certificate of conviction, made and filed under the foregoing provisions, or a duly certified copy thereof, shall be evidence in all

The People *v.* Powers.

courts and places, of the facts stated therein." The evidence was therefore competent, and the question whether other evidence to show that the court had acquired jurisdiction of the person of the prisoner, and whether such other evidence was or was not sufficient to establish that fact, does not arise on this bill of exceptions.

The next question arises on the rejection by the court of evidence offered by the prisoner to contradict the fact of a *trial and conviction*. This could not be done. The certificate was a *record*, made evidence by the statute, of the facts contained in it, and could not be contradicted by parol evidence. Even if it were no higher evidence than any ordinary instrument in writing, parol evidence to vary or contradict it would be inadmissible. It can not be necessary to cite authorities to prove a proposition so elementary. In holding that the evidence in question was inadmissible, we do not mean to say that the record of conviction by a court of inferior jurisdiction, can not be contradicted as to jurisdictional facts. A party may doubtless prove facts which will show that the court had no jurisdiction of the offence or of the person of the prisoner. But that was not the offer as disclosed on this bill of exceptions. It was simply to contradict the record by showing that in point of fact the prisoner was not convicted.

These are all the questions presented on the bill of exceptions; and as the court below committed no error to which the prisoner has excepted, the conviction must stand.

A new trial is denied.

SAME TERM. *Before the same Justices.*LEACH *vs.* KELSEY and others.

Where a debtor makes a fraudulent transfer of his whole property in order to defraud a judgment creditor, he can not, by a mere voluntary assignment of his property and effects to a trustee, for the benefit of all his creditors, prevent an assignee of the judgment creditor from bringing an action in the nature of a bill in equity against the debtor and the purchasers, to subject the property fraudulently transferred, or its proceeds, to the payment of the judgment.

The right to set aside the fraudulent sale will not pass, by such an assignment, and can not be asserted by the assignee.

The assignor would be estopped from asserting his own fraud, in a suit brought by the creditor against the fraudulent vendee; and the title of the assignee, being derivative merely, he takes no claim, by virtue of the assignment, which the assignor could not enforce.

Where a witness is objected to as incompetent, if the objection is on the ground of interest, that must be stated as the ground of objection, and the nature of the interest must be specified; so that the party may, if in his power, remove it.

Where an objection to the competency of a witness is not taken on the hearing before a referee, it will be considered as waived.

A more stringent rule does not prevail, under the code, in respect to the admissibility of parties as witnesses against their co-defendants, than existed under the former practice.

The credibility of a witness, on a hearing before a referee, is a question solely for the referee; and his decision can not be supervised.

THIS was an appeal, by the defendants Eaton and Spicer, from a judgment entered upon the report of a referee. The action was brought by the plaintiff as assignee of a judgment creditor of the defendant Kelsey, against him and the other defendants Eaton and Spicer, alledging a sale by Kelsey to the other defendants, of his entire property, for the purpose of defrauding the judgment creditor. The referee reported that he found the following facts: First. That Lee, Judson & Lee were partners as merchants, in the city of New-York, and about the 17th day of November, 1847, sold to the defendant Kelsey a bill of goods, amounting to \$398,01, on credit. That on the 22d day of February, 1848, they obtained a judgment therefor; that execution was issued on this judgment to the sheriff of Onondaga county, on the 25th day of February, 1848, and on the 16th day of May, 1848, returned entirely unsatisfied; and on

Leach v. Kelsey.

the 16th day of September, 1848, they assigned that judgment to Daniel Larned, receiving the whole amount therefor. That on the 27th day of September, 1848, said judgment was assigned to the plaintiff in this suit. That Larned held by assignment, as collateral security for payment of this debt, an article on a house and lot belonging to Kelsey.

Second. That in May, 1846, Kelsey obtained a patent for a beehive. That defendant Lewis M. Eaton, his brother-in-law, made small advances, and assisted him in obtaining his patent, and about that time entered into an agreement with him in relation to the sale of said right, by which they were to divide the avails of sales between them ; and made sales to a nominal amount of thirty or forty thousand dollars, but from which was in fact realized but a very small part of that amount. That about the month of December, 1846, Kelsey bought out a small stock of goods in Syracuse, and then became a merchant, in which business he continued for about a year, and until the latter part of November, 1847. That at that time he became much embarrassed, and was trying to sell out. That Eaton understood his business, but advised him to go to New-York again and make heavier purchases ; assigning as a reason, that his expenses for clerk hire, rent, &c. would be no more by increasing his stock, and that would enable him to meet his debts easier. That Kelsey went to New-York and made purchases, but lighter than usual, and among others made the debt in question. That soon after he came home, his debts were coming due faster than he could meet them. He was being sued. That in two instances he, with the advice of Eaton, gave a bond and warrant of attorney, on which to enter up judgment at a future day. That before the days thus agreed upon, and on the 26th of November, 1847, and while he was owing about \$10,000, Kelsey sold out his entire stock in trade, including fixtures, and some of the goods for which this debt was made, to the defendants Eaton & Spicer, for the amount of \$8000 ; being the amount of goods as estimated by Mr. Parsons, their chief clerk, without an inventory ; upon the understanding that they should pay for them by giving their notes for \$4000, for 6, 12,

Leach *v.* Kelsey.

and 18 months, 6 months without interest, and that the amount of money which they had in fact advanced to Kelsey, was to apply on the sale, which would make the \$8000, less thirty or thirty-two per cent discount on the goods ; that these notes were to be given after they got their goods to Yates county, and that was the best terms he could sell the goods upon to any one. That he had negotiated with others. That soon afterwards and within a week an invoice of the goods was taken, by which it seems the goods fell short about \$1100 from \$8000. That the goods were boxed up and taken by Eaton & Spicer to Yates county, where they went into trade. That during the invoicing of these goods, they were levied on by the sheriff, by an execution of about \$628 on another judgment against Kelsey, and that Eaton & Spicer settled that execution, and another debt to the same individuals of about the same amount ; taking at the same time a chattel mortgage on the household furniture of Kelsey, and a mortgage on a city lot, encumbered by another mortgage then being foreclosed ; which lot only brought about enough to satisfy the first mortgage. Kelsey testified that at the time this personal mortgage was given, Eaton said he had better give it, to keep his furniture from his creditors. That Eaton & Spicer did not give for the goods their notes, and assigned as a reason that they might have trouble with Kelsey's creditors ; and about the time they were removed, Eaton stated to Woolson, that if they got the goods safe into Yates county, there would be something going to Kelsey on them. The defendants Eaton & Spicer put in evidence an agreement between Eaton and Kelsey, bearing date 23d of December, 1845, in relation to selling said patent, and dividing the avails of the sale. Also a bill of sale of the goods and stock in trade from Kelsey to Eaton & Spicer, dated November 26, 1847, acknowledging the receipt of payment in full for them, \$1483 from Eaton & Spicer for money had and advanced, and \$6517 from Eaton, purporting to be one third of all the receipts belonging to said Eaton from the sale of a certain beehive, making \$8000 without regard to a deduction of 30 or 32 per cent. But the referee came to the conclusion that that statement of payment in full

Leach v. Kelsey.

was put in at Eaton's suggestion, to show to Kelsey's creditors that he had paid for the goods, and that the contract first given in evidence by the defendants, was not the original contract but a copy signed by Kelsey about the time he sold out to Eaton & Spicer, and ante-dated ; and that the subject matter of it had been settled, and formed no part of the consideration for the sale of the goods. Eaton & Spicer also introduced a power of attorney from Kelsey to Eaton, dated 18th of June, 1846, authorizing said Eaton to sell his patents. And they proved a general assignment by William R. Kelsey, of his property to Daniel Larned, for the benefit of his creditors, dated 29th of February, 1848. Considering the supporting evidences and corroborating circumstances, the referee regarded the evidence of Kelsey as unimpeached. He therefore decided, first, that when this debt was created, Kelsey was on the eve of bankruptcy ; and that by obtaining the goods under such circumstances all the defendants practised a fraud on Lee, Judson & Lee. Second, that Eaton & Spicer received those goods for the purpose of delaying the creditors of Kelsey in collecting their debts ; and that, having received them under such circumstances, they were liable, and ought to account for them. Third, that a general assignment executed by Kelsey subsequent to the sale of the goods in question to Eaton & Spicer, did not deprive Lee, Judson & Lee of any remedy they had against said Eaton & Spicer ; and upon the same principle, the referee decided that the security given by Kelsey to Larned did not release Eaton & Spicer from their fixed liability to account for those goods. Fourth, that this judgment never having been paid, was a subsisting and available claim in the hands of the present assignee ; and that he was entitled to the same remedy against Eaton & Spicer, that Lee, Judson & Lee would have had, had they not assigned it. The referee also reported that the defendants should pay to the plaintiff \$448,04, being the amount of the said judgment, including interest. And judgment was entered in favor of the plaintiff for that sum, against all the defendants. Kelsey did not appear, nor put in any answer.

Leach *v.* Kelsey.

P. Outwater, for the plaintiff.

E. Van Buren, for the defendants Eaton & Spicer.

By the Court, GRIDLEY, J. This is an action in the nature of a bill in equity, brought by the assignee of a judgment creditor of Kelsey, against him and the two other defendants, Eaton & Spicer, alledging a sale by Kelsey to Eaton & Spicer of his whole property, in fraud of the judgment. A referee has reported in favor of the plaintiff, and a judgment has been entered on the report, from which judgment the defendants Eaton & Spicer have appealed.

The only grounds relied on by the appellants' counsel are 1st. That the plaintiff can not maintain this action inasmuch as it appears that after the sale and before the commencement of the suit, Kelsey had made a general assignment in favor of all his creditors. It is supposed that this claim passed by the assignment, and can only be asserted by the assignee. This is a mistake. The general assignee takes no claim which the assignor could not enforce. His title is derivative merely; and the assignor would be estopped from asserting his own fraud in a suit against his fraudulent vendee. The case of *Brownell v. Curtiss*, (10 *Paige*, 210,) is decisive upon this point.

2dly. That Kelsey was an incompetent witness for the plaintiff, to prove the sale fraudulent. (1.) It is said that the witness was interested within the decision in *Rea v. Smith*, (19 *Wend.* 293.) It would be sufficient to say that the objection was not put on this ground, or on any particular ground, before the referee. Not only must the interest be stated, as the ground of objection, but the nature of the interest must be stated, so that the party may, if in his power, remove it. Where the nature of the interest was not stated, in the record, though the witness was the vendor of the party, the court would not notice it. (*Cowen & Hill's Notes*, 256. 10 *Martin's Rep.* 633, 8.) (2.) Again; it is insisted, that by sections 343 and 344 of the code, in connection with the cases of *Pillow and Wife v. Bushnell*, (4 *Howard's Sp. T. Rep.* 9,) and *M. & F. Bank v. Wil-*

Leach *v.* Kelsey.

but et al. (2 *Code Rep.* 33,) Kelsey could not be sworn as a witness. It has not been held that a more stringent rule prevails under the code than existed under the former practice. Kelsey was not examined as a *party* against himself, but he was offered as a witness against his co-defendants, and as such he might have been examined under the 63d chancery rule of the rules of 1847. The only possible objection—that of interest—not having been taken before the referee, was waived. (1 *Cowen & Hill's Notes*, 256, 266.) Kelsey had put in no answer; and there was no issue between him and the plaintiff. The relief to be granted was not necessarily against any party, except Eaton & Spicer. But if it were otherwise, Kelsey was inevitably liable on his judgment, and allowed the complaint to be taken against him without interposing any defence. (See 2 *John. Ch. Rep.* 625; 5 *Paige*, 632.)

3dly. It is urged that the report is against evidence. If Kelsey is to be believed, the report was fully warranted, and the credibility of this witness was a question solely for the referee, whose decision we can not supervise.

I have said that there is no objection raised to the report and judgment except those which we have already discussed. It is true that the report is against all three defendants, and the judgment is joint against them. It would have been more in accordance with the old practice to have ordered the two defendants Eaton & Spicer to apply so much of the proceeds of the property fraudulently purchased by them as would be sufficient to pay the plaintiff's judgment and the costs of the suit. But the joining of Kelsey in the report, in the manner the referee has chosen to adopt, is not an error prejudicial to the other defendants, and of which they can justly complain.

We therefore are of opinion that the judgment must be affirmed.

Judgment affirmed.

SAME TERM. *Before the same Justices.*BRONSON & CROCKER *vs.* GLEASON.

As a general rule, the store of the merchant, the shop of the mechanic or manufacturer, and the farm or granary of the farmer, at which commodities sold are deposited or kept, is the place of delivery, when the contract is silent as to the place.

But this rule ceases to be applicable when the collateral circumstances indicate a different place.

When the goods are a subject of general commerce, and are purchased in large quantities for reshipment; and the purchaser resides at the place of reshipment, and has, at such place, a storehouse and dock for that purpose; the place of business of the purchaser is ordinarily the place of delivery.

Where a manufacturer of salt at L. executed a writing as follows, "I have this day agreed with B. & C. of Oswego, to sell them one boat load of salt per week and *deliver the same* to them, *in good order*, equal to 400 bbls. each week from this time to the first of November next," &c.; *Held* that upon the reasonable construction of the agreement, in connection with the surrounding circumstances, the salt was to be delivered at Oswego.

APPEAL from a judgment of the recorder's court of the city of Oswego. The complaint was for the breach of an agreement in writing to deliver to the plaintiffs a quantity of salt at Oswego. The answer of the defendant denied that the agreement set forth had been entered into by the parties, and set up that by the terms of the proposition the defendant was to deliver the salt at Liverpool, that being the place where the salt was manufactured; averring a readiness to perform at Liverpool, and a refusal by the plaintiffs to accept the proposition made by the defendant. The plaintiffs replied that they accepted the offer of the defendant, and that by the writing the salt was to be delivered at Oswego; averring a readiness on the part of the plaintiffs to perform, and a refusal by the defendant to perform the contract. The plaintiffs also replied, that by custom or usage the place of delivery was at Oswego; also averring that at the date of the contract, and for one week after, salt at Oswego was not worth more than the sum mentioned in the proposition or offer of the defendant, and was worth much less at the manufactorys at Liverpool.

Bronson *v.* Gleason.

The cause was tried before the recorder without a jury ; trial by jury having been waived by the parties, pursuant to subdivision 3d of section 266 of the code of procedure. The counsel for the plaintiffs presented and read in evidence the writing, a copy of which was set forth in the complaint in the words and figures following, to wit :

“LIVERPOOL, July 16, 1846.

I have this day agreed with Bronson & Crocker, of Oswego, to sell them one boat load salt per week, and deliver the same to them, in good order, equal to 400 bbls. each week from this time to first November next, at eighty-three cents per bbl. payable as delivered, one-half by their note at 90 days with interest, and one-half cash, or such note as the bank will discount, adding interest, and I agree to hold this offer open one week, and if they write to me within that time, then I am to deliver said salt as above stated.

L. GLEASON.”

The counsel for the plaintiffs then introduced and read in evidence the following letter from the defendants :

“OSWEGO, July 17, 1846.

Mr. L. Gleason, Liverpool—Dear Sir :—Since the return of our Mr. Crocker, we have concluded to accept your proposition made yesterday to sell us 400 barrels salt, delivered to us here each and every week, from that time to first November next, payable as stated in said contract or proposition, at 83 cents per barrel. You will therefore please send us the salt, say one load per week as therein stated. Yours respectfully,

BRONSON & CROCKER.”

Which said letter, it was admitted by the pleadings, was written by the plaintiffs and sent to the defendant, within one week after the said 16th day of July, 1846. The counsel for the plaintiffs offered to prove that a large business in the sale and purchase of salt was, in the year 1846, carried on between persons manufacturing salt in Onondaga county, at the places where salt was manufactured, and Oswego, where the plaintiffs reside and transact their business, and that the custom or usage in such transactions, whenever sale was made in Onondaga

Bronson v. Gleason.

county, was for the vendor to deliver the salt to the purchasers in Oswego; which testimony was objected to by the counsel for the defendant, the objection sustained by the court, and the plaintiffs' counsel excepted. The counsel for the plaintiffs also offered to prove that on the 16th day of July, 1846, and for one week thereafter, salt delivered in Oswego was not worth any more or a greater price per barrel than 83 cents, the price mentioned in the contract, and was worth a much less sum or price per barrel at the manufactories in Liverpool, which was objected to by the counsel for the defendant, the objection sustained by the court, and the plaintiffs' counsel excepted. The counsel for the plaintiffs then offered to prove what salt was worth per barrel, at Oswego, during the existence of the contract. The defendant's counsel objected to said testimony on the ground that if any contract was shown between the parties, the salt was not to be delivered at Oswego, but at the salt manufactory of the defendant in Liverpool. The court overruled the objection, and the defendant excepted. It was then, for the purpose of saving proofs, admitted by the counsel for the defendant that the difference between the price of salt at Oswego, and the contract price, during the existence of said contract, for the amount to be delivered under the writing bearing date July 16, 1846, was in the aggregate \$448. The defendant's counsel also admitted that previous to the said 16th July, 1846, the defendant had sold salt at Oswego, from a canal boat, to the plaintiffs, and rolled the salt from the canal boat on to the dock of the plaintiffs by the defendant and his hands. By the pleadings it was admitted that the defendant, at the date of the writing, was a salt manufacturer, doing business at Liverpool, and the plaintiffs knew it, and that his manufactory was at Liverpool. The counsel for the defendant admitted that no part of the salt mentioned in the contract had been delivered by the defendant to the plaintiffs. Here the plaintiffs rested their cause, and the defendant's counsel moved for a nonsuit on the following grounds: First. That the plaintiffs could not recover because no contract was shown to have existed between the parties, and none was proved. Second. That by the terms of the writing,

Beeson v. Gleason.

bearing date July 16, the salt to be delivered was in law to be delivered at the manufactory of the defendant, in Liverpool, and the letter of acceptance was not in the terms of the proposal. Third. That the law fixes the place of delivery at the manufactory of the defendant, and the letter of the plaintiffs making the place of delivery at another place, was not an acceptance. Fourth. That the plaintiffs could not recover without showing a readiness to perform the contract on their part. The motion was denied by the court, and the defendant's counsel duly excepted to the decision. The court then decided that the plaintiffs were entitled to recover against the defendant the sum of \$448; and the defendant appealed.

B. B. Burt, for the plaintiffs.

G. F. Comstock, for the defendant.

By the Court, GRIDLEY, J. There is no doubt that as a general rule the store of the merchant, the shop of the mechanic or manufacturer, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, is the place of delivery when the contract is silent as to the place. (2 *Kent's Com.* 505.) This rule however ceases to be applicable, when the collateral circumstances indicate a different place. When the goods are a subject of general commerce, and are purchased in large quantities for reshipment; and the purchaser resides at the place of reshipment, and has at such place a storehouse and dock for that purpose, the place of business of the purchaser is ordinarily the place of delivery.

In the case under consideration we know, from the public laws of the state, the situation of the city of Oswego, of the village of Liverpool, of the Oswego Canal, and that Oswego is a port from which salt is shipped to places beyond the limits of this state. We also know from the pleadings and from an admission on the trial of the cause that the plaintiffs were dealers in the article of salt; and had, previous to the date of the contract in question, purchased salt of the defendant, which he had trans-

Bronson v. Gleason.

ported in boats, and by himself and hands delivered the same to the plaintiffs, upon their dock at Oswego.

Aided then by the light of these extrinsic facts, and looking to the amount of salt agreed to be delivered, and the times provided for such delivery, we think it a reasonable construction of the contract that the delivery should be at Oswego. That the court below had a right to look at these extrinsic facts, and for that purpose would have been justified in receiving some of the evidence which was offered and excluded, is clearly established by adjudged cases. (See *Smith v. Doe*, 2 *Brod. & Bing.* 473, 547 to 554; 6 *Com. Law*, 243, 247; *Wigram's Extrinsic Ev.* 59 and 138, and 58, note b.; 1 *Greenl. Ev.* p. 412.) The place of business of dealers in butter, cheese, hops, and other articles destined to a distant or foreign market is the ordinary place of delivery by the vendors. So we think the dock and storehouse of the plaintiffs was the place of delivery for the salt in question. Ch. Kent says that it is well settled in Vermont and New-York that if a note be given for cattle, grain, or other portable articles, and no place of payment be designated in the note, the creditor's place of residence is the place of delivery. (2 *Kent's Com.* 507, and cases there cited.) But he says the rule laid down by Ld. Coke is that, if the contract be to deliver specific articles, as wheat or timber, the obligor must seek the obligee before the day and ascertain where he desires the delivery to be made. (2 *Kent*, 506.) He adds, on the next page, however, that if the place intended by the parties can be inferred from collateral circumstances, there is no necessity that the place should be otherwise designated. We think that in this case the recorder had a right to infer, from the surrounding circumstances, and the language of the contract, that the salt was to be delivered at Oswego. The language of the contract is very significant. "I have this day agreed with Bronson & Crocker of Oswego to sell them *one boat load* of salt per week, and *deliver the same to them, in good order*, equal to 400 barrels each week from this time to the first November next." This certainly indicates the delivery, not of salt enough for the loading of a boat each week; but of *an actual boat load*; which

The People *v.* Norton.

can only be satisfied by a delivery to the plaintiffs by the defendant, of an actual load of salt per week. Again ; the words "*in good order*" would seem to imply that it was not the intention of the parties that the salt should be received at the manufactory. This expression would be much more likely to be used in reference to salt that was to be transported, in a boat, by the defendant, to its place of destination, and there delivered "*in good order*" to the plaintiffs. And this we think is the true construction of the contract.

The judgment must be affirmed.

WASHINGTON SPECIAL TERM, December, 1849. *Willard, J.*

THE PEOPLE *vs.* NORTON and others.

7b 477
66 AD¹ 588

An indictment will lie against commissioners of excise for wilfully and corruptly granting a license to a person to sell spirituous liquors, as an innkeeper, knowing that he is not a man of good moral character, nor a person of sufficient ability to keep a tavern ; that he has not the necessary accommodations to entertain travellers ; and that a tavern is not absolutely necessary at the place where he proposes to keep a tavern.

Justices, in granting or refusing licenses under the excise law, do not act solely as judicial officers. They have indeed a discretion to exercise, which the supreme court will not control by mandamus. But their duties are so plainly defined, that if they wilfully disregard them they are liable to an indictment.

DEMURRER to indictment. The indictment was found at the August oyer and terminer for Washington county, in 1849. It contained three counts not essentially differing from each other. It charged in substance that the defendants, being the commissioners of excise for the town of Fort Edward, for the year 1849, met at said town on the first Monday of May, 1849, as such, and thereupon *knowingly, designedly, unlawfully and corruptly* did grant a license to one William B. Hitchcock as an innkeeper of said town to sell strong and spirituous liquors and

The People *v.* Norton.

wines to be drank in his said house, in the following form: the indictment then set out the license, which was in the usual form of a tavern license, under the statute. It then averred that Hitchcock was not at that time a man of good moral character, nor a person of sufficient ability to keep a tavern; that he had not the necessary accommodations to entertain travellers, and that a tavern was not absolutely necessary at the place where Hitchcock proposed to keep a tavern; all which the defendants then and there well knew. It was also alledged that the defendants, when they granted the license, were not satisfied that Hitchcock possessed the qualifications expressed in the license, or that an inn or tavern was absolutely necessary at that place. The other two counts were substantially the same. The defendants demurred to the indictment, and the district attorney joined in the demurser.

C. L. Allen, for the defendants.

H. B. Northup, (district attorney,) for the people.

WILLARD, J. The act relative to excise, and the regulation of taverns and groceries (1 *R. & S.* 677, 8, § 4) authorizes the commissioners of excise to grant licenses to keepers of inns and taverns being residents of their town, to sell strong and spirituous liquors and wines to be drank in their houses respectively; and section 6 forbids the granting of such license unless such person proposes to keep an inn or tavern, and unless the commissioners are satisfied that the applicant is of good moral character; that he is of sufficient ability to keep a tavern; and has the necessary accommodations to entertain travellers; and that a tavern is absolutely necessary for the actual accommodation of travellers at the place where such applicant resides or proposes to keep the same; all which it is required should be expressed in such license. The indictment charges that the applicant for a license was not a man of good moral character, nor of sufficient ability to keep a tavern; that he had not the necessary accommodations for that purpose, and that a tavern was not necessary for

The People v. Norton.

the actual accommodation of travellers, at that place ; all which the commissioners well knew ; and that they granted the license certifying to the existence of the requisite facts, without being satisfied of their truth, and in short, knowing to the contrary. It charges also, that this was knowingly, unlawfully, designedly and corruptly done.

The demurrer raises the question whether an indictment will lie in such case.

In *Ex parte Pierson*, (1 *Hill*, 655,) an application for a mandamus to the commissioners of excise of Westport, in Essex county, to compel them to enter a resolution to grant a license for keeping a tavern in that town to the relator, was denied by this court. Mr. Justice Cowen, who delivered the opinion of the court, remarked that whether a board of excise will grant a tavern license, is an open question, until a resolution is entered in their minutes pursuant to the third section of the act. (1 *R. S.* 678.) Until that stage of the proceeding, he thought the court could not interfere by a mandamus. "The sixth section," he continues, "very properly confers upon them a large discretion, the exercise of which, either in granting or refusing a license, can not be coerced in any way." This case does not touch the question, whether a wilful abuse of that discretion is or is not punishable by indictment.

It is a general principle that when the common law or a statute forbids the doing of a thing, the doing of it wilfully is indictable, though without any corrupt motive. (1 *Chit. Cr. L.* 239. 2 *Hawk. Cr. Pl.* 171. *Rex v. Sainsbury*, 4 *T. R.* 457. *Same v. Robinson*, 2 *Burr.* 799. *Same v. Wigg*, 2 *Salk.* 460. *Same v. Carlisle*, 3 *B. & A.* 161.)

In the present case the statute forbids the granting of a tavern license, except under certain circumstances and to persons of particular qualifications, and it makes the commissioners of excise judges of these circumstances and of the qualifications of the applicant. For a mere error in judgment, while acting with an honest desire to discharge their duty, they would be in little or no danger of conviction by a petit jury. But the rule that a judge is not indictable for an error in judgment extended at

The People v. Norton.

common law only to judges in courts of record, and not to ministerial officers. This was so held in *Rex v. Loggen*, (1 *Str.* 74,) and *Ashby v. White*, (Salk. 19.) It was for this reason that the constitution of the United States and of this state provided for the impeachment of judicial officers, leaving them liable after being removed from office, to indictment and punishment according to law. (*Art. 1, § 3, Const. U. S.* *Art. 6, § 1, Const. of 1846.* *Const. of 1777, § 23.* *Const. of 1821, art. 5, § 2.*) The whole subject of judicial responsibility was exhausted in the case of *Yates v. Lansing*, (5 *John.* 282,) by Kent, Ch. J. and in the same case in error, (9 *John.* 395.) Although that was a civil suit, and the principal point ruled was, that a judge of a court of record is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment; yet the whole doctrine was fully examined and discussed. If not liable to a civil action at the suit of a party aggrieved, much less would he be liable to an indictment, until after a conviction and punishment by impeachment.

The constitution throws no such obstacles in the way of an indictment of commissioners of excise. They are not liable to impeachment. There is no provision for removing from office the supervisor, who usually presides in the board of excise. Justices of the peace may indeed be removed after due notice, and an opportunity of being heard in their defence, and the same is the case also with respect to other judicial officers. (*See Const. of 1846, art. 6.*) But the common law has not clothed them with the same immunities as it has courts of record, except in those cases where they act purely in a judicial capacity. As they can not be impeached for corruption, they may be indicted. In England the proceeding against them is either by information in the king's bench, or by indictment; and Lord Tenterden, in *The King v. Borron*, (3 *B. & A.* 432,) observes, that whenever their conduct is sought to be questioned either by information or indictment, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under

The People v. Norton.

which description fear and favor may generally be included, or from mistake or error. In the former case alone, they have become the objects of punishment. (See 12 *John.* 356.)

Justices, in granting or refusing licenses under the excise law, do not act solely as judicial officers. They have indeed a discretion to exercise, which this court will not control by mandamus. But their duties are so plainly defined that if they disregard them they are liable to an indictment.

The duty of commissioners of excise in this state is extremely similar to that of justices of the peace in England, in granting or refusing licenses to sell ale. The conduct of justices, in that respect, has frequently been the subject of investigation; and it seems to be clear, says Mr. Russell, that though upon this matter they have a discretionary jurisdiction given them by law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and under the control of the court of king's bench. That court will therefore grant an information against justices who refuse, from corrupt and improper motives, to grant such licenses; and an information will be granted against them, as well for granting a license improperly, as for refusing one in the same manner. (1 *Russ. on Cr.* 136. *Rex v. Young et al.* 1 *Burr.* 556, 560. *Same v. Williams and Davis,* 3 *Id.* 1317. *Rex v. Holland and Foster,* 1 *T. R.* 692. *Same v. Sainsbury et al.* 4 *Id.* 451.)

By demurring, the defendants concede that they granted the license in question to a person whom they knew was not a man of good moral character, not a man of sufficient ability to keep a tavern; that he had not the necessary accommodations, and that a tavern was not necessary at the place where he proposed to keep it. This was a clear violation of duty, for which they were liable to be indicted.

I think there should be judgment for the people on the demurrer, with leave for the defendants to withdraw the demurrer and plead to the indictment.

Judgment accordingly.

RENSSELAER SPECIAL TERM, December, 1849. *Harris*,
Justice.

RUSSELL *vs.* CLAPP.

An answer which alleges that "the plaintiff who prosecutes the action is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted," is bad on demurrer, for not stating the *facts* upon which the defendant relies, to sustain his allegation that the plaintiff has no right to sue.

Under the present system, it is intended to confine the pleadings to a simple statement of facts. Neither the evidence by which the facts alledged are to be established, nor the legal conclusions to be derived from such facts, can properly be stated. *Per Harris*, J.

DEMURRER to answer. The complaint stated that the plaintiff, on the 5th day of January, 1847, recovered against the defendant in a court of common pleas held at Boston, Massachusetts, a judgment for \$4031, which remained unreversed and unsatisfied; and the plaintiff demanded judgment for the amount of such judgment, with interest.

The defendant put in an answer alledging "that the plaintiff who prosecutes this action is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted." The plaintiff demurred to this answer, stating as the ground of demurrer that the defendant did not state and set forth in such answer the name of the real party in interest, or in whose name the action ought to have been prosecuted.

HARRIS, J. The radical change which the code has made in the rules by which the sufficiency of a pleading is to be determined, is well stated by Mr. Justice Sill, in *Glenny v. Hitchins*, (4 *How. Pr. Rep.* 98.) Under the present system it is intended to confine the pleadings to a simple statement of facts. Neither the evidence by which the facts alledged are to be established,

Russell v. Clapp.

nor the legal conclusions to be derived from such facts, can properly be stated. A complaint is sufficient if it contains a simple statement of facts which, if proved, will entitle the plaintiff to judgment. The answer, in like manner, is sufficient if it deny, generally, all the facts stated in the complaint, or specifically, any particular fact stated, so as to form an issue of fact upon the matters of the complaint, or, admitting the facts stated in the complaint, to be true, if it states other facts which, if proved, will countervail the legal effect of the facts alledged in the complaint and admitted to be true, and shows that notwithstanding the truth of such facts, the defendant, and not the plaintiff, is entitled to judgment. Thus in the case of *Glenney v. Hitchins*, above cited, it was enough for the plaintiff to alledge the sale and delivery of the goods. These facts established, the obligation of the purchaser to pay for them is the conclusion of the law upon these facts. If the goods had been sold by a third person, to the defendant, it would have been necessary for the plaintiff further to state, in his complaint, that the vendor had assigned the demand to him, or, that the vendor having died, he had been appointed his executor or administrator, or some other facts from which the legal inference could be drawn that he, and not the vendor, was *the real party in interest*. It clearly would not be sufficient for the plaintiff to state, generally, the sale and delivery of the goods by a third person to the defendant, and then alledge, as a reason for bringing the action in his name, instead of that of the vendor, that the plaintiff and not the vendor was *the real party in interest*. The facts which, if proved, would authorize the court to adjudge him to be the real party in interest, must be stated. So, I apprehend, if the defendant would avoid the plaintiff's right to recover by showing that some other person, and not the plaintiff, is the real party in interest, he must state in his answer such facts as, when established by proof, will enable the court to say, as matter of law, that the plaintiff is not the real party in interest.

Suppose an issue of fact had been formed, by a reply to the answer, in which the plaintiff had alledged that he was, in fact,

Russell *v.* Clapp.

the real party in interest. Upon the trial of such an issue it would be necessary for the defendant, in order to maintain his side of the issue, to prove a state of facts, such as an assignment of the judgment, executed by the plaintiff since its recovery, or a transfer of his interest by operation of law, from which he could ask the court to determine that the plaintiff was not the real party in interest. Those facts, whatever they may be, upon which the defendant relies, as the ground upon which he will ask that it should be adjudged that the plaintiff is not the real party in interest, should have constituted the matter of allegation in his answer. This I understand to be in accordance with the theory of pleading adopted by the code. Each party should present in his pleadings the facts which he intends to establish by proof, if controverted, and upon which he expects the law to be pronounced. These facts should be so presented that upon the trial the court can see from the pleadings what facts are disputed and what are not; and be able to proceed to the determination, first of the disputed facts, and then of the rights of the parties as established.

My conclusion, therefore, is that the answer is insufficient, for the reason that it does not state the facts upon which the defendant relies to sustain his allegation that the plaintiff has no right to sue. The plaintiff is, consequently, entitled to judgment upon the demurrer. But as the answer was probably interposed in good faith, the defendant may have leave to amend, within ten days after notice of this decision, upon payment of costs.

NEW-YORK GENERAL TERM, December, 1849. *Jones, Edmonds, and Edwards*, Justices.

THE MAYOR &c. OF NEW-YORK *vs.* WHITNEY.

On the 13th of May, 1846, the common council of the city of New-York passed an ordinance directing that a bulk-head should be built across Pike slip, on the southerly line of South-street, and the vacant space behind filled with earth. At about the same time the common council passed an ordinance for the making and completion of that part of South-street which lies below Pike slip and Market slip, by building a bulk-head on the southerly line of said street. *Held*, that the building of the bulk-head across Pike slip, and filling the vacant space behind, in pursuance of these ordinances, was to be deemed the filling up of a slip, under section 267 of the act of April 9, 1813; (2 R. L. of 1813, p. 445;) and that the assessment for the expenses of such improvement was properly made under the 269th section of the same act; one third of the amount to be paid by the city, and two thirds by the persons in the vicinity, benefited thereby. And this, notwithstanding the effect of the improvement was to continue South-street.

Although the acts of 1798 and 1813, giving to the city of New-York the right to lay out and complete a street or wharf of the width of 70 feet, in front of those parts of the city adjoining the East river, give no right, in express terms, to fill up a slip beyond the then existing boundary of the city, yet the city has a general right to fill up slips; and is not guilty of an illegal assumption of power, if the result of the exercise of such a right is the making of a street of the width authorized by statute.

THIS was an action of debt, brought to recover the amount of an assessment made upon the defendant's property for his portion of the expenses of building a bulk-head across Pike slip in the city of New-York. Plea *nil debet*. The cause was tried at the New-York circuit in May, 1846, before Edmonds, Cir. J. The jury brought in a special verdict, by which they "gave it as their opinion" that "the construction of the bulk-head in front of Pike slip was necessary and effectual in the regulation of South-street; and that the filling up of Pike slip between Water and South-street was a necessary consequence."

The Mayor, &c. of New-York *v.* Whitney.

H. E. Davies, for the plaintiffs.

J. J. Ring, for the defendant.

By the Court, EDWARDS, J. The plaintiffs in this suit brought their action for the recovery of the sum of \$4810, being the amount assessed upon the defendant, as the owner of a lot of land in the neighborhood of Pike slip, for his proportionate share of the expenses of building a bulk-head in front of said slip, on the line of South-street.

On the 13th of May, 1846, the plaintiffs in common council convened passed an ordinance "That a bulk-head be built across Pike slip, on the southerly line of South-street and the vacant space behind filled with good and wholesome earth, under such directions as shall be given by the street commissioner and one of the city surveyors." They also appointed commissioners for the purpose of estimating the expense of carrying the ordinance into effect, and making the necessary assessments.

It appears from the case, that at about the same time the common council passed an ordinance for the making and completion of that part of South-street which lies below Pike slip and Market slip, by building a bulk-head on the southerly line of the said street; and it is admitted that the effect of building the bulk-head across Pike slip, and filling the vacant space behind, was to continue South-street.

Upon this state of facts, it is contended on the part of the plaintiffs, that the building of the bulk-head, and filling the space behind, was the filling up of a slip under section 267 of the act of April 9, 1813; (2 R. L. 1813, p. 445;) and that the assessment was properly made under section 269 of that act, and was legal. On the other hand, the defendant contends that the building of the bulk-head, and the filling up of the vacant space, was the making of a street, and that, being so, the assessment was illegal. In the former case, the law provides that one third of the expense shall be borne by the mayor, &c. of the city, and the residue by persons in the vicinity who may be benefited; and in the latter, it requires the expenses to be paid

The Mayor, &c. of New-York v. Whitney.

and borne by the proprietors of the land nearest, and opposite to the street, according to the width of their several lots.

By the laws of 1813, the plaintiffs are authorized to fill up all public slips in the city, at such times, and in such manner, as they may deem proper. That this act gives them the right to fill up a slip, in such a way that it may become a public highway, or street, is not denied. On the contrary, if the slip is entirely filled up, the space so filled necessarily becomes a public highway; and it is because it does so, that adjoining proprietors are supposed to be benefited.

If, in this case, the bulk-head had been built on the northerly line of South-street, the space filled up would have been a street; and yet no one will deny that the act would have been the filling up of a slip. By building the bulk-head on the southerly line of South-street, and filling up the vacant space behind, the act is none the less the filling up of a slip.

It is undoubtedly true that one of the objects contemplated by the common council was the continuation of South-street. But the only means by which this end could be accomplished were by filling up the slip. The provisions of the law, in reference to making, and paying for streets, did not apply; for these provisions contemplated a case where there were adjoining proprietors, who had lands lying opposite to the intended street.

In the case of *Ross et al. v. The Mayor, &c. of New-York*, (3 Wend. 333,) the rule of assessment adopted was the same as in this case, and the court there said that the assessment was correctly made. It was contended, however, upon the argument, that that was not a question at issue before the court. It is true that it was not the only question. But a reference to the case will show that it could be raised upon the return to the certiorari. And it further shows that it was distinctly made a point by the counsel, and that the court could not with propriety have passed it over without deciding it.

It is said, however, that the bulk-head in this case was placed thirty feet beyond the boundaries of the city, as established by the Montgomery charter; and that the acts of 1798 and 1813, which gave to the city the right to lay out and complete a street

Hesketh v. Stevens.

or wharf, of the width of 70 feet, in front of those parts of the city which adjoin the East river, give no right to fill up a slip beyond the then existing boundary.

It is true that they confer no such right in express terms. But the city has a general right to fill up slips, and, if the result of the exercise of such a right is the making of a street, of the width authorized by statute, it can not be said that the city has been guilty of an illegal assumption of power.

It is evident that the plaintiffs intended to act in pursuance of the provisions of the 267th and 269th sections of the act of 1813, and the case shows that they complied with those provisions. Under these circumstances, we are of opinion that their proceedings were legal and regular; and that they are entitled to recover the amount assessed upon the property of the defendant.

The verdict found by the jury is so inconclusive that we have not considered it necessary to allude to it.

Judgment must be entered for the plaintiffs.

7 488
132a 505

SAME TERM. *Before the same Justices.*

HESKETH vs. STEVENS.

A mortgagee of a vessel, not in possession, is not liable for repairs done upon the vessel.

The holding of a bill of sale, or having the mere legal title to a vessel, does not of itself render a party liable for repairs.

The credit is supposed to be given to the party in possession acting as owner. And as long as he remains in possession, with the consent of the party holding the legal title, and manages and controls the vessel, and receives the profits, he is, for all practical purposes, the owner; especially when he is so treated by the persons doing work upon the vessel.

ASSUMPSIT, tried at the New-York circuit in March, 1846, before EDMONDS, circuit judge. The action was brought to

Hesketh v. Stevens.

recover the amount of a bill for repairs done by the plaintiff, as a blacksmith, upon the steamboat Portsmouth. The plaintiff proved the performance of the work, and that the same was done by the direction of the engineer of the boat. To prove that the defendant was owner of the boat, the plaintiff proved that she was registered at the custom house in his name, on the 10th of October, 1843, at which time the defendant made an affidavit that he was the true and only owner of the said vessel. The defendant read in evidence the deposition of P. Cagger, who testified that from 1836 until May, 1845, he was the partner of the defendant and was intimately acquainted with his business, and was acquainted with, and knew, the nature of the defendant's interest in the steamboat Portsmouth; that the only right, title or interest which he had was as mortgagee thereof, which mortgage was created by a bill of sale of said boat from Isaac V. Baker to the defendant, and a defeasance from the latter to Baker; which papers were executed at the same time, and were parts of the same transaction and agreement. That the defendant never had possession of the boat, directly or indirectly, until Cagger, as his agent, took possession thereof, and sold it under the mortgage, on the 20th of July, 1844. That such possession only lasted a few minutes. That the boat was always in the possession of Peter Comstock, who claimed sometimes to act as agent for the said Isaac V. Baker, who was his son-in-law, and sometimes to act as agent for Allen Comstock, the son of the said Peter. That Comstock employed the master and hands of the boat before she was so mortgaged to the defendant, and continued to receive all the proceeds and earnings of the boat, up to the day she was sold by Cagger, as agent for the defendant. That the boat was registered by Cagger in the defendant's name at the request of Comstock, and for his benefit; Comstock paying the fees therefor. The bill of sale was dated Sept. 26, 1842, and conveyed the vessel to the defendant, absolutely, with her tackle, apparel and furniture, subject to a mortgage thereon for \$8000 held by Lewis Barnes. The instrument called a defeasance, executed by the defendant to Baker, bore date March 2, 1843. It acknowledged the execution of the bill

Hesketh v. Stevens.

of sale, on that day, "for the purpose of securing and paying the following debts;" naming several debts due to other persons, from Baker & Comstock, and an indebtedness to the defendant and Cagger, the amount of which was not specified. The instrument concluded as follows: "And after the payments aforesaid I am to refund the residue of the avails thereof to the said Isaac V. Baker, on demand, after the above are paid. All of the above provisions, however, are subject to the payment of such sums as may be required to be paid upon a mortgage of \$8000, now held upon said boat by Lewis Barnes."

The testimony having closed, the defendant's counsel insisted, 1st. That the plaintiff, from his own proof, was not entitled to recover any thing against the defendant, there being no proof whatever that the defendant had ever requested the plaintiff, or any body else, to do the work pretended to be done, or any part of it, or that he ever knew it was done, and that if he were the owner of the vessel he would not be liable for work of this description done without his request, knowledge or assent. 2. That it appeared from the defendant's evidence that his only right to, or interest in the boat was as mortgagee, and that he never in any manner had possession of the boat. The counsel for the plaintiff insisted that a mortgagee, whether in possession or not, was liable for repairs of the vessel, and also that the conveyance to the defendant, and the defeasance from the defendant to Baker the vendor, did not constitute a mortgage. The plaintiff's counsel insisted that the plaintiff was entitled to recover interest on his account. His honor the circuit judge recommended a verdict subject to the opinion of the court upon a case to be made; to which the counsel for the respective parties assented; and thereupon a verdict for \$203,97 was taken for the plaintiff, subject to the opinion of the court, upon a case.

G. A. Shufeldt, for the plaintiff.

S. Stevens & H. B. Cowles, for the defendant.

By the Court, EDWARDS, J. It appears by the case, upon which the questions before us are presented, that Isaac V. Baker,

Hesketh v. Stevens.

who was the owner of the steamboat or vessel called the Portsmouth, executed a bill of sale of her to the defendant in this suit, dated December 26, 1842. It also appears that the defendant executed to the said Baker an instrument in writing, under seal, dated March 2, 1843, in which he acknowledged the execution of the bill of sale, and stated that it had been executed to him for the purpose of securing and paying certain debts, which were particularly mentioned; and declared that after the payment thereof, he was to refund the residue of the avails to Baker. This instrument also declared that all the provisions contained in it were subject to the payment of such sums as were required to be paid upon a mortgage on the vessel for \$8000. The bill of sale, and the instrument executed by the defendant bear different dates, but the last mentioned instrument contains a recital that they were executed on the same day, and the testimony of Cagger shows that such was the fact.

The first question to be considered is, what is the legal effect of the two instruments?

It is evident that the defendant was not made the absolute owner of the vessel, with the right to take possession of her, and use her as his own, without further accountability. He was vested with the ownership, it is true, but only for a particular purpose; that is, to secure and pay certain debts due by Baker, and to return the residue of the avails to him. If in the meantime, however, Baker had paid the debt, inasmuch as the purposes of the transfer would have been satisfied, there is no doubt that he would have been equitably entitled to a retransfer to himself; or, in other words, he had the right of redemption. And, in whatever light the defendant is to be regarded, his rights are certainly not greater than those of a mortgagee.

It would appear from the instrument executed by the defendant, that some of the debts, for the security and payment of which the bill of sale was executed, were not due to him. But that fact would not essentially change the character of the interest acquired by him. It would impose additional responsibilities upon him. It would make him a trustee for the benefit of the other creditors mentioned, to the extent of the debts sta-

Heaketh v. Stevens.

ted to be due to them; but it would not require him to take possession of the vessel, and use her, and receive the profits. Indeed, such a result does not seem to have been contemplated; for the object of the transfer was security, and, if necessary, payment; which was evidently intended to be made by a sale, for a provision is made for the disposition of the residue of the avails after a sale.

The next question to be considered is, whether the defendant is liable for the work which was done upon the vessel, between the time of the execution of the two instruments, and the final sale?

It appears from the testimony of Cagger, that the defendant did not in fact take possession, but that, on the contrary, Baker remained in possession, receiving the profits, while the services, to recover the price of which this suit was brought, were rendered, and until the final sale of the vessel by the defendant on the 20th of July, 1844; and that the defendant then took possession by his agent for a few minutes only, and merely for the purpose of making a sale.

It is well settled that a mortgagee of a vessel, out of possession, is not liable for repairs. (*Thorne v. Hicks*, 7 *Coven*, 697. *Ring v. Franklin*, 2 *Hall*, 1. *McIntyre v. Scott*, 8 *John.* 159. *Champlin v. Butler*, 18 *Id.* 189. *Miln v. Spinola*, 4 *Hill*, 177.) And, in the case of *Leonard and McCartee v. Hunting-ton*, (15 *John.* 289,) where a contract had been entered into for the sale of a vessel, and possession had been taken immediately, but it was agreed that a bill of sale should not be given until the whole of the purchase money was paid, and, in the mean time, the register stood in the name of the original owner, who, however, exercised no control over the vessel, it was held that he was not liable for repairs made by the direction of the master. (See also *Wendover v. Hogeboom*, 7 *John.* 308, *S. P.*) In the case of *Thorn v. Hicks*, (7 *Coven*, 697,) the owners of a sloop entered into a contract with another person that he should take and run the sloop in the freighting business, and out of the avails should pay the owners a certain sum of money, but that, until that was paid, the legal title should remain in the

Hesketh v. Stevens.

vendors, and, when paid, should vest in the vendee. The vendee took possession of, and used the sloop; and it was held that the vendor was not liable for the acts or contracts of the master. And in the case of *Durham & Browning v. Mellen et al.* which was decided in this court at the last September term, where the owner of a vessel had executed a bill of sale, and delivered possession of the vessel to the vendee, but the bill of sale was left in *escrow*, until the vendee should complete his payments, it was held that the vendor was not liable for repairs put upon the vessel, during the time when she was in possession of the vendee, and while the bill of sale remained in *escrow*.

The principle which is to be deduced from all these cases is, that the holding of a bill of sale, or having the mere legal title to a vessel, does not of itself render a party liable. The credit is supposed to be given to the party in possession acting as owner, and, as long as he remains in possession, with the consent of the party holding the legal title, and manages and controls the vessel, and receives the profits, he is, for all practical purposes, the owner; especially when he is so treated by the persons doing work upon the vessel.

In the case before us the whole credit must have been given to Baker. He acted as owner, and received the profits. The defendant derived no benefit under the bill of sale to him, except so far as the right to sell the vessel and pay the debt due to himself, was concerned. If he chose to select his own time for exercising that right, it was a matter solely between himself and the persons for whose benefit the sale was to be made. At least, a person doing work for the vessel, on the credit of the party in possession, could have no right to complain.

We are of opinion, upon the case presented to us, that judgment should be entered for the defendant.

Judgment for the defendant.

SAME TERM. *Before the same Justices.*

EHLE vs. BINGHAM.

The judgment of a court of competent jurisdiction, directly upon the point, is conclusive by way of plea in bar in another suit, where the same matter is directly in question between the same parties.

7b 494
37 Mis⁴79

And if the previous judgment, relied upon as a bar, is set up as such in the notice attached to a plea of the general issue, it will be equally conclusive as if pleaded specially.

And where it appears from an inspection of the record of the judgment in the former suit, that the same matter in issue in the second suit was directly in question in the former suit; and it also appears from the testimony taken on the former trial that evidence was given, or attempted to be given, in support of the defence then set up, by an examination of the plaintiff's witness, this is sufficient to constitute a bar; although the defendant introduced no witness on his part.

The fact that the proof on the part of the defendant in the former suit was held insufficient to establish the defence set up, is no evidence that the matter in issue in the second suit was not distinctly passed upon in the former suit.

The mere fact that in the former suit another person was joined as a defendant with the plaintiff in the second suit, will not deprive the defendant in the second suit of the benefit of the former judgment, as a bar.

Where there is no question raised, on the second trial, as to the identity of the matters in controversy in the two suits, but the only question is as to the effect which ought to be given to the former judgment, it should not be submitted to the jury to determine whether the matter in issue in the second suit was passed upon in the former.

MOTION for a new trial. The action was brought to recover damages for the breach of a warranty upon a sale of sheep; and was tried at the New-York circuit in June 1846, before EDMONDS, Circuit Judge. The plaintiff alledged, in his declaration, that the defendant sold him 181 sheep, which he warranted to be sound, free from disease, and good mutton, for which the plaintiff agreed to pay \$317; giving his note for that sum. The plaintiff averred that the sheep were diseased, and had the scab, and that the defendant knew it; and that the plaintiff turned them in with a flock of 500 other sheep, which all became diseased thereby. The defendant pleaded the general issue, and gave notice of a former suit brought by

Ehle v. Bingham.

him upon the note given for the price of the sheep, against John H. Ehle, the plaintiff in this suit, and his brother Daniel Ehle, who signed the note as surety for John H. Ehle, in which suit the subject matter of this action was set up and insisted on as a defence, by the defendants therein. On the trial of the present suit the plaintiff proved the purchase of the sheep by him, from the defendant, and the warranty. The defendant gave in evidence the judgment record of a cause between Nathan Bingham, plaintiff, and John H. Ehle and Daniel Ehle, defendants, which action was upon a promissory note given for the purchase of the sheep in question, and that the defendant in that action set up as a defence in that action the subject matter of this suit. The defendant also gave in evidence the deposition of John Nellis, the referee in the former cause, to show what took place, on the trial before him. On the trial of this cause the plaintiff's counsel took four exceptions: 1st. To the decision of the circuit judge sustaining the objection of defendant's counsel and overruling the offer of plaintiff's counsel to show by Daniel Ehle, the witness and surety to the note, that he would not have become security if he had known that the sheep were diseased. 2d. To the introduction of the record in evidence. 3d. To the evidence of John Nellis. 4th. To that part of the opinion of his honor the circuit judge, in which he stated that the former suit was a bar to this action, and that the record of the judgment in that suit was conclusive evidence of that fact. The judge instructed the jury to find a verdict for the defendant; and the jury, under such instructions, found a verdict accordingly. The defendant, upon a bill of exceptions moved for a new trial.

H. P. Allen, for the plaintiff.

Mitchell & Sacia, for the defendant.

By the Court, EDWARDS, J. Since the decision which was made in the *Duchess of Kingston's case*, (20 *Howell's State Trials*, 538,) the judgment of a court of competent jurisdiction,

Ehle *v.* Bingham.

directly upon the point, has been considered conclusive by way of plea in bar in another suit, where the same matter is directly in question between the same parties. There has been some diversity of opinion whether it will have the same effect as evidence, when it is not pleaded. In the case before us the previous judgment, which is relied upon as a bar, was set up as such in the notice attached to the defendant's plea. Of course, then, there can be no question whether or not it was properly given in evidence; and it follows that the circuit judge was right in instructing the jury that it was conclusive, provided the same matter was directly in question, and was passed upon in the former suit. (See *Young v. Rummill*, 2 *Hill*, 478.)

The plaintiff, in the present action, claimed to recover damages for false and fraudulent representations on the sale of a quantity of sheep. The defendant pleaded what was intended as the general issue, and gave notice that he would insist upon, and prove by way of bar, that in a former suit brought by the defendant upon a promissory note made by the plaintiff and one Daniel Ehle, and given for the identical sheep mentioned in the plaintiff's declaration, he gave notice that he would prove, and that he attempted to prove by way of defence, the same matter which is set forth as the cause of action here, and that a judgment was rendered for the plaintiff in that suit.

Upon the trial of this cause the defendant introduced in evidence the record of the judgment in the former suit; and it appears from inspection that the same matter in issue here was directly in question in that suit. It also appears from the testimony taken on the former trial, that evidence was given, or attempted to be given, in support of the defence which was then set up.

It is said, however, on the part of the plaintiff, that in the former suit he introduced no witness on his part, and that therefore he should not be considered as having set up a defence. The bill of exceptions shows that he introduced testimony, and although it was by an examination of the witness of his adversary, still that examination was in reference to new matter, which had been pleaded by way of defence, and had reference

Ehle v. Bingham.

to the very point which is in issue here. We are not at liberty to say that the matter was not distinctly passed upon in the former suit, because the proof on the part of the defendants was insufficient. Neither can we take into consideration the fact which was urged on the argument, that the referee decided the suit before the defendants were prepared with all their proofs. If they were entitled to any benefit from such a consideration, they should have applied for relief in the former suit.

But, it was said that the defendants abandoned their defence before the referee made his report. The bill of exceptions shows no such fact. It shows that the defendants failed to establish their defence; not that they abandoned it.

It was also contended that the parties in the two suits were different. But it will be remembered that the former suit was upon a promissory note, which grew out of a transaction to which the plaintiff and defendant in this suit, alone were parties, and that the plaintiff in this suit put in a separate plea, and notice of matter personal to himself; and the mere fact that another person was sued with him ought not to deprive the defendant in this suit of the benefit of the former judgment.

It was further contended by the plaintiff's counsel that it should have been submitted to the jury to determine whether the matter in issue in this suit had been passed upon in the former suit. It will be seen by reference to the bill of exceptions that there was no question upon the trial as to the identity of the matters in controversy in the two suits. The only question was as to the effect which should be given to the former judgment. In the case of *Gardner v. Buckbee*, (5 *Caron*, 226,) which was relied upon by the plaintiff's counsel, it did not appear from the record, whether the two cases were founded on the same, or a different state of facts; and one of the grounds on which the admissibility of the record in the former suit was objected to was, that the subject matter of the two suits was different. It also appears from that part of the opinion of the court which was relied upon on the argument, that there was a question as to the identity of the matters in controversy.

The conclusion, then, to which we have arrived is, that as
VOL. VII. 63

Dyckman v. The Mayor, &c. of New-York.

the points in issue here, were also in issue, and were passed upon in the former suit, the judgment in that suit must be considered as conclusive; and that the circuit judge was right in so instructing the jury.

The motion for a new trial is denied.

•••

SAME TERM. Before the same Justices.

DYCKMAN vs. THE MAYOR, &c. OF THE CITY OF NEW-YORK.

Under the 12th section of the act of May 2d, 1834, "to provide for supplying the city of New-York with pure and wholesome water," which authorizes the water commissioners to enter upon land and agree with the owner of any property which may be required, as to the amount of compensation to be paid to him, and which provides that in case of disagreement the vice chancellor may, upon the application of either party, appoint three persons to appraise the value of the property, or the amount of damages, it is not necessary that there should be a formal offer of compensation upon the one side, and a refusal upon the other, before an application can be made for the appointment of appraisers.

All that a reasonable construction of the act requires is, that the parties should have failed to come to an amicable arrangement; or, in other words, that there should be a difference of opinion as to the compensation which one party would be willing to give, and the other party to receive.

What is a sufficient notice of the application for the appointment of appraisers. An appearance of the owner, by his counsel, before the vice chancellor, to oppose the confirmation of the report of the appraisers, without raising the objection of a want of notice of the application for the appointment of appraisers, or of an insufficient notice, will be considered a waiver of the objection.

Where property required by the water commissioners is owned by several persons as tenants in common, it is not necessary there should be a separate appraisement of the value of the undivided interest of each of the co-tenants. It is sufficient in such a case, to appraise the value of the whole property together.

A tender of the compensation ascertained by the appraisers, to one of several owners of the land taken, who has acted in behalf of the others throughout the proceedings, and who has been authorized by his co-tenants to refuse it, or whose acts are subsequently ratified by them, is a valid tender to all the owners.

THIS was an action of ejectment for land in Westchester county, taken by the Croton Water Commissioners in the con-

Dyckman v. The Mayor, &c. of New-York.

struction of their aqueduct. The cause was tried at the Westchester circuit in October, 1846, before Barculo, circuit judge. On the trial the following facts were admitted by the counsel for the defendants, viz.: That William N. Dyckman, formerly of Greenburgh in the county of Westchester, now deceased, the father of the plaintiff, was at the time of making and publishing his last will and testament, and at the time of his death, seised and possessed of a farm of land in Greenburgh aforesaid, of which the premises described in the declaration in this cause were part and parcel. That the said William N. Dyckman, at his death, left him surviving a widow and six children, of whom the plaintiff was one, the names of which six children are Cathalina B., Sampson, Jonathan O., Maria, William W., the plaintiff, and Rebecca. That since the death of the said William N. Dyckman, his said widow and children had continued in the occupation of the said farm, including the premises described in the declaration, until some time during the year 1838, when the defendants took possession of the said premises; and that the defendants had continued and were then in the possession of the premises described in the declaration, and claimed the exclusive possession thereof. And thereupon the counsel for the plaintiff produced and gave in evidence the last will and testament of the above named William N. Dyckman, deceased, bearing date on the 2d day of February, 1820, which was duly proved as a will of real estate, before the surrogate of the county of Westchester, on the 12th day of April, 1834, in and by which said last will and testament the testator devised all his real estate to his said widow and children in equal proportions, share and share alike. The plaintiff here rested his case. And thereupon the counsel for the defendants offered to produce and read a copy of a petition to the vice chancellor of the first circuit, from the water commissioners of the city of New-York, appointed under the act entitled "an act to provide for supplying the city of New-York with pure and wholesome water," and a notice of presenting such petition; but to the introduction of the said papers, the plaintiff, by his counsel, objected, and insisted that such papers could not be read unless the defendants first showed

Dyckman v. The Mayor, &c. of New-York.

an attempt by the water commissioners *to agree with the plaintiff as the owner of the land*, as to the amount of compensation to be paid for the land which might be required by the water commissioners under the act above mentioned. The judge thereupon directed that the said petition and all the papers produced on the part of the defendants should be read, subject to any objections on the part of the plaintiff. And thereupon the counsel for the defendants produced and read the petition and notice above mentioned. The petition recited the passage of the "Act to provide for supplying the city of New-York with pure and wholesome water," passed May 2d, 1834; that the petitioners entered upon their duties as water commissioners, and previous to the 1st of January, 1836, made a report to the common council of their proceedings and the plan adopted by them; which plan was approved by the common council; and such further proceedings were had that the common council instructed the commissioners to proceed in the work. The petition also stated that the petitioners had caused surveys to be made of the several pieces of land, &c. required for the construction of the work, and to be filed with the clerk of Westchester county. That for the construction of the said work they required that the corporation of New-York should become seised in fee of certain lands therein specified, among which was the *locus in quo*. That the petitioners had offered to purchase the said piece of land, of the owners thereof, but had not been able to agree with either of them as to the price. They therefore prayed for the appointment of three indifferent persons to examine said land and estimate the value thereof, and to report thereon; and that upon the confirming of their report an order or decree might be made, directing that upon the payment of the sums mentioned in the report of such appraisers, within two months thereafter, to the owners, or to such person or persons as the court might direct, the title to said property should become vested in the corporation of New-York. There was a notice annexed to the petition stating that the petition would be presented to the vice chancellor on the 12th of Sept. 1837; with an affidavit of service of the petition and notice personally upon Mrs. Dyckman and

Dyckman v. The Mayor, &c. of New-York.

three of her children on the 6th of Sept. 1837, and of service upon Maria Dyckman, William W. Dyckman (the plaintiff) and J. O. Dyckman *by delivering the same to their mother*, at her residence, on the same day.

The defendants also gave in evidence an order made by the vice chancellor, on the 13th of Sept. 1837, according to the prayer of the petition. This order was made *ex parte*. The defendants also gave in evidence the report of the appraisers, in which they estimated and valued the premises in question at \$3000; also an order made upon the motion to confirm that report, by which the motion was denied, and it was referred back to the appraisers to receive further testimony, to review and re-examine their report, and to make a further report. The second report of the appraisers was also produced and read, by which the appraisers adhered to their former report, and valued the premises in question at \$3000. Also an order made on the 21st of May, 1838, confirming the second report of the appraisers. Upon both of these motions Mr. W. N. Dyckman appeared as counsel for the plaintiff in this suit and the other owners of the premises, and opposed the granting of the orders. The defendants examined Philip S. Crooke, as a witness, who testified that he was attorney for the water commissioners, and solicitor in the proceedings in chancery. That on the 23d of May, 1838, he went to the house upon the premises in question, with \$3000 in gold, to tender the same to the owners of the land. That he saw Jonathan O. Dyckman, and some others, but he believed the plaintiff was not present; that they all lived together; that J. O. Dyckman had acted for the family, in appraising the damages; that the witness told him he had brought \$3000 in order to pay the family for the appraisement of the land, and showed him the gold; that J. O. Dyckman said, "We will not take it; we have made up our minds not to take the appraisal; we are going to fight it out." That the witness made the tender to J. O. Dyckman because he had acted for the family; that he was present through all the proceedings in the appraisement and hearings before the appraisers; that the plaintiff attended some of the meetings when Jonathan was present. The witness also

Dyckman v. The Mayor, &c. of New-York.

testified in his cross-examination, that he made a written application to the vice chancellor of the first circuit for leave to pay into court the amount of the appraisement. That it was opposed on behalf of the owners, by their counsel, on the ground that the order confirming the second report of the appraisers had been appealed from. That the application was refused by the vice chancellor. That he had no doubt the application was made within sixty days from the making of the order confirming the report of the appraisers. That he did not know that the money had ever been paid to any person designated by the vice chancellor. The defendants here rested. The counsel for the plaintiff called *Charles Dusenbury* as a witness, who testified that he, the witness, was one of the water commissioners of the city of New-York. And thereupon the counsel for the plaintiff offered to prove by this witness that no attempt had been made to agree with the plaintiff as to the amount of compensation to be paid to him for the property described in the declaration in this cause. The counsel for the defendants objected that such testimony was irrelevant and not pertinent to the issue then to be tried. The circuit judge decided that such objection was well taken, and that the testimony so offered on the part of the plaintiff should not be received; to which decision the plaintiff's counsel excepted. The plaintiff's counsel called as a witness *Jonathan O. Dyckman*, one of the devisees of William N. Dyckman, deceased, and tenant in common with the plaintiff in the land claimed in this suit. The defendants objected to this witness as incompetent, on the ground that he was interested to establish the title of the plaintiff in this suit, and to ensure him a recovery. The objection was overruled by the circuit judge, who decided that the witness was competent. And thereupon the said Jonathan O. Dyckman testified that he had no authority to act for the plaintiff in this business; that the plaintiff always told the witness that he would act for himself; that the witness knew how much had been awarded; that he had made up his mind not to take it; and that if the said Philip S. Crooke had counted down \$3000 for the family, he would not have taken it. That Sampson Dyckman, (the brother of the witness

Dyckman v. The Mayor, &c. of New-York.

and of the plaintiff,) employed William N. Dyckman of the city of New-York, to act for the family, that he, the witness, agreed to it. The witness being asked if the members of the family had agreed that William N. Dyckman should go on, answered, yes. That he knew the family were dissatisfied with the award of \$3000. He knew that the plaintiff was dissatisfied.

The counsel for the plaintiff objected, and insisted that the documentary evidence produced on the part of the defendants was insufficient and ought not to be received. 1. Because the proceedings against the owner were joint, instead of being several. 2. Because the defendants had shown no attempt to agree with the owners. 3. Because no personal notice had been given to the plaintiff, of the application for the appointment of appraisers. 4. Because there was no proof of any decision on the appeal. 5. Because the defendants could not become seized of the premises in question, except upon payment of the appraisement. 6. Because no tender was made to the plaintiff. 7. Because Jonathan O. Dyckman, to whom the tender was made, had no authority to act for the plaintiff. The circuit judge overruled the objections of the plaintiff's counsel; and decided that such documentary evidence should be read; to which opinion and decision of the judge the plaintiff excepted. The counsel for the defendants then moved for a nonsuit; which motion was granted, and the plaintiff excepted. And the plaintiff, upon a bill of exceptions, moved for a new trial.

W. N. Dyckman, for the plaintiff.

H. E. Davies, for the defendants.

By the Court, EDWARDS, J. The first ground of objection which was taken by the plaintiff to the documentary evidence introduced by the defendants was, that they had shown no attempt to agree with the owners of the property in question, as to the amount of compensation, before application was made for the appointment of appraisers.

The act of 1834 (*Laws 1834, p. 453, § 12,*) authorized the

Dyckman v. The Mayor, &c. of New-York.

water commissioners to enter upon land, and agree with the owner of any property which might be required, as to the amount of compensation to be paid to him. And it provided, in case of disagreement, that the vice chancellor might, upon the application of either party, nominate and appoint three indifferent persons to examine such property, and to estimate the value thereof, or damages sustained thereby, and to report to the court without delay ; and that upon the confirmation of the report by the vice chancellor, the commissioners should within two months thereafter pay to the owner, or such person or persons as the court might direct, the sum mentioned in the report, and that thereupon the mayor, &c. of the city of New-York should become seized of the property.

It will be observed that this act delegated to the defendants the exercise of the right of eminent domain, for the purpose of constructing a work of great public benefit and utility. But, inasmuch as the right could not be so exercised consistently with the provisions of the constitution, unless just compensation should be made for all property taken, the act contained a provision directing in what manner such compensation should be ascertained ; and as there might be many cases in which the water commissioners could, if proper facilities were afforded to them, come to an agreement with the owners of the property as to what should constitute a just compensation, without the necessity of having a formal examination and appraisement, a provision was made by which they were authorized to enter upon the property required, for the purpose of making surveys, and agreeing with the owner thereof as to the amount of compensation. This provision was not intended for the purpose of protecting any right of the owner of the property required, nor for the purpose of conferring any benefit upon him ; and it is not contained in most of the acts in which corporations have been authorized to exercise the right of eminent domain. The object of the legislature was to afford every facility for an amicable arrangement between the water commissioners and the owners of property. The act then provided that in case of dis-

Dyckman v. The Mayor, &c. of New-York.

agreement, three indifferent persons might be appointed to examine the property, and estimate its value.

The construction which is given by the counsel for the plaintiff to this last provision is, that before application can be made for the appointment of appraisers there must be a formal offer of compensation upon the one side, and a refusal upon the other—that there must be an issue formed between the parties. We do not think that such a construction is necessary for the protection of the rights of the owners of property, nor that such is the spirit and meaning of the statute. All that any reasonable construction of the act can require is, that the parties should have failed to come to an amicable arrangement; or, in other words, that there should be a difference of opinion as to the compensation which one party would be willing to give, and the other party to receive. That such a state of facts existed in this case, it would seem, could hardly be denied after reading the bill of exceptions. It there appears that the owners of the property attended before the appraisers; that they objected to the confirmation of the appraisers' report; that there was a second examination of the property; that the confirmation of the second report was objected to; that after it was confirmed it was appealed from; and that, finally, when the amount of compensation had been fixed the owners of the property not only refused to receive it, but objected to its payment into court. If there had been no disagreement how is it possible that the parties could have been in a continued state of opposition from the commencement of the proceedings before the vice chancellor to this day?

But it is contended that no notice of the application for the appointment of appraisers was given to the plaintiff.

The statute does not, in terms, require any notice to be given. The practice, however, was to give notice, and I shall assume that a correct interpretation of the statute required it. But no provision is made as to what should constitute a sufficient notice. It appears from the bill of exceptions that the notice to the plaintiff was served upon his mother, who was one of the tenants in common, at her residence on the premises, and it also

Dyckman v. The Mayor, &c. of New-York.

appears that the plaintiff, and all the other owners of the property, resided with her. There is no general rule of law which requires that the service of notice shall in all cases be personal. Notice may, in some instances, be given by publication; in other cases it may be sent through the mail; and in others, it may be served by being left at the residence of the party, or at his place of business. The latter is considered sufficient notice under the law merchant, in many transactions of high importance. And, in a case like the one before us, there is no reason why it should not be considered, at least, as *prima facie* sufficient. But, even if it were insufficient, the plaintiff has waived all objection to the regularity of the proceedings on that ground. An appearance without objection will always cure a defect arising from a want of, or from an insufficient notice. The bill of exceptions shows that all the members of the family employed William N. Dyckman to act for them as counsel. It also shows that the counsel thus employed appeared before the vice chancellor in opposition to the first report made by the appraisers; that he appeared before the appraisers on the second examination of the property; that he appeared in opposition to the confirmation of the second report, and that he never made any objection to the proceedings either on the ground of a want of notice, or that there was not a case of disagreement within the provisions of the act.

The next objection taken to the regularity of the defendants' proceedings is, that there should have been a separate appraisement of the value of the interest of each of the co-tenants.

The act speaks of the "*owner* of any property which may be required." The word *owner*, according to every reasonable construction of the statute, means the person or persons who represent a particular piece of property, where there is a *unity of possession*. Although the separate tenants in common have separate and distinct interests, still, as it is expressed, "none knoweth his own severalty;" and it is not the province of the appraisers to make partition of, and adjust the interests of the different tenants, which they would be required to do, if they appraised the interest of each tenant severally. The extent of

Dyckman v. The Mayor, &c. of New-York.

the duties of the appraisers, under the statute, is to estimate the value of property required.

The final objection which was taken is, that the compensation which was ascertained by the appraisers, was not paid within two months after the confirmation of their report.

It is not pretended, on the part of the defendants, that an actual payment was made, but they contend that they made a valid legal tender. If such a tender was made, it was undoubtedly a sufficient compliance with the statute.

The testimony of the attorney for the water commissioners shows that he went to the residence of the plaintiff, and that he made a tender in gold of the amount awarded by the appraisers, to one of the members of the family; that the person to whom the tender was made had acted for the family throughout the proceedings; that when the tender was made to him, he was told that it was made for the benefit of the family; and that he said "*we will not receive it.*"

There is no doubt that the tender was regular in form; and we think that the evidence satisfactorily shows that the person to whom it was made was authorized by all his co-tenants to refuse it. But, if there were any doubt whether such an authority had been previously granted, the bill of exceptions shows that his acts were subsequently acknowledged and ratified; for it appears from the testimony which was introduced by the plaintiff, upon the cross-examination of one of the defendants' witnesses, that when the attorney for the water commissioners applied to the vice chancellor for leave to pay the money into court, the counsel who represented all the owners, including the plaintiff, opposed it, and that owing to such opposition the application was denied. The defendants then did every thing in their power for the purpose of making payment. If they failed in doing so, it was through the fault of the plaintiff alone, and he can have no just cause of complaint.

The motion for a new trial must be denied with costs.

7 508
121a 513
7 508
82b 316
7b 508
8ap235

7b 508
51ad400

7b 508
168 NY 1618

SAME TERM. Before the same Justices.

DRAKE and others vs. THE HUDSON RIVER RAILROAD CO.

By an act of the legislature the Hudson River Railroad Company was authorized and empowered to construct a railway between the cities of New-York and Albany, commencing in the city of New-York, with the consent of the corporation of New-York ; and the directors were authorized to locate such railroad on any of the streets or avenues of the city of New-York westerly of, and including, the Eighth avenue, and on or westerly of Hudson-street, provided the assent of the mayor and common council should be first obtained for such location. The railroad company having, with the assent of the corporation of New-York, located their railroad on and through certain streets of the city, within the district mentioned in the act, and obtained permission from the common council to lay down a double track of rails from West-street through Canal and Hudson streets to Chambers-street ; *Held* that the court would not interfere by injunction to prevent the railroad company from laying down its rails in those streets, and using the same for the purposes of their railroad, upon the application of persons owning property bounded on such streets, alledging that the construction of the railroad through those streets was unauthorized by law, and a nuisance ; that their property would be injured and depreciated in value, and their business seriously affected thereby ; and that real estate and property vested in them by law had been taken for the location and construction of such railroad without previously making them compensation therefor.

For contingent and consequential damages of that nature, when they occur, the party aggrieved has a remedy by action at law, and by a repetition of such action from time to time during the continuance of the grievance, whenever and as often as loss or damage ensues.

And if the use of the railroad, in the streets of the city, becomes a nuisance, or the aggression proves to be permanent and without an adequate remedy at law, then the supreme court will be competent to administer its equitable relief by injunction, to prevent its continuance, or for its removal. *Per JONES, P. J.*

But a strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction, as a precautionary and preventive remedy.

The prohibition of the constitution is against *taking* private property for public use, without making compensation ; and not against *injuries* to such property, where it is not taken.

Contingent future damages, or incidental and consequential injuries, of indefinite amount, not capable of estimate, do not come within the rule.

Therefore, where it is not alledged that private property has been taken by a railroad company, for the purposes of the road, but it is claimed that it is and will be injuriously affected by erections made, and proposed to be made and used, by the company, in its vicinity, the owners have no claim to have their damages ascertained and paid for before such erections shall be constructed and used.

Drake v. The Hudson River Railroad Co.

A railroad is not, *per se* a nuisance. Nor is the use of a street in a city, for a railroad track, in such a manner as not to abridge or obstruct the right of passage and repassage for other purposes, such an exclusive appropriation of the street as to amount to a nuisance, or a purpresture.

Nor will the construction of a railroad through the streets of a city amount to an infringement of private rights, though the track should cause a slight change in the surface of the streets; provided the passage is left free and unobstructed for the public.

The owners of property bounded upon streets in a city have rights in such streets, and an interest in the maintenance of them in their integrity; but such right and interest consist merely in the use, benefit, and enjoyment of them as public streets or highways for the legitimate uses and purposes of streets. They have no private or exclusive right to, or property in, the use or enjoyment of them.

Per JONES, P. J.

All other citizens have an equal right, with such owners, to the use of the public streets as such. And a railroad company, as part of that public, have the same right, in common with others, to use the same, under the rules and regulations prescribed by the proper authority, for the purposes to which the lands forming the streets were dedicated to the public, or taken by the corporation for public purposes. *Per JONES, P. J.*

It seems that, for the purpose of managing and regulating the public streets in the city of New-York, and the use of them for the trusts and purposes of their dedication or establishment; prescribing the width of the sidewalks and of the carriage way; licensing the partial and temporary use of parts of them for necessary private purposes; and permitting or prohibiting special uses for particular objects, &c. the legal title to the land or soil of the streets is vested in the city corporation, subject to the public use of them as public streets of the city.

Per JONES, P. J.

And if the corporation of the city are the owners of the legal title to the soil of the streets, they are the only parties whose rights of property are violated, or whose ownership can be said to be usurped, by the construction of a railroad through such streets. And they are the only persons who can claim the right to have the rails removed, or the use of the street vindicated, or freed, from the alledged incumbrance, or the proceedings of the railroad company arrested until compensation shall be made. *Per JONES, P. J.*

THIS was an application by the plaintiffs, who represented themselves to be owners of real estate fronting upon, and bounded by, Hudson and other streets in the city of New-York, in and through which the Hudson River Railroad had been laid out, for an order or injunction restraining the defendants from laying down a double track of rails, or any track of rails, whether single or double, of any kind whatever, with suitable curves and turnouts, or otherwise, from the northerly line of Canal-street,

Drake v. The Hudson River Railroad Co.

at West-street, through Canal and Hudson streets, to Chambers-street, or any where within the said limits, and that the said order or injunction be perpetual; and that the said defendants might be ordered to remove and take away so much of the said railroad as they had laid or caused to be laid down in Canal-street, and in any part of said route from West-street, to or near Chambers-street. The motion was founded upon the complaint of the plaintiffs, and affidavits annexed thereto; and was resisted by the defendants upon affidavits; no answer having been put in, when the motion was made. All the material facts are stated in the opinions delivered by the several members of the court.

E. Sandford, for the plaintiffs. 1. The legislature, in enacting the charter of the defendants, conferred a franchise upon a mere private corporation, and they had no constitutional power to authorize private property to be taken without the consent of the owners, for the use of such a corporation, even upon making full compensation.

2. The legislature had not power, under the constitution, to delegate to the defendants, a mere private corporation, any part of the sovereign power of the people of this state, to be exercised by the defendants, at their own discretion and for their own benefit. The legislature have not declared what lands shall be appropriated to the use of the defendants, nor appointed any public officers or political agents, or organs of the sovereign power, to exercise the sovereign discretion; but have left the appropriation to be made by a private corporation, acting upon the irresponsible judgment of its own agents as to what lands are necessary for the use of their road. They had no power to authorize them to take lands in fee; no power to authorize them to take materials.

3. If the defendants have, by their charter conferred upon them, the right to take private property for the uses of their railroad, such property can only be taken by them upon paying just compensation.

4. Such compensation must be made by the defendants be-

Drake v. The Hudson River Railroad Co.

fore the land can be taken by them for the use of their road, and before any work can be done thereupon towards the construction thereof.

5. By the charter of the defendants they are required to make compensation for all land, real estate and property taken possession of, and used for the construction and maintenance of their railroad, or which may be affected by any operation connected with such construction and maintenance.

6. The plaintiffs have an interest in the lands taken by the defendants in laying down their railroad track upon portions of Hudson-street and Canal-street, and are respectively the owners of other lands fronting on said streets, which are injuriously affected by the construction and maintenance of the road upon said streets.

7. It is not necessary to establish the claim of the plaintiffs to damages in this case, to show that the plaintiffs, or either of them, are tenants of the freehold, or legal owners of the land upon which the defendants were about to lay their iron rails. If others be the owners of the lands facing the parts of Hudson-street and Canal-street, the plaintiffs own lots fronting thereon, and have an interest in and right of passage over these lands for the purposes of their business, convenience or pleasure. This right is an incorporeal hereditament, and for the particular injury to this right and the lots of land owned by them respectively, the plaintiffs were entitled to have compensation made to them, before the defendants proceeded to lay down their rails. It is sufficient that they have some interest which will be impaired by the defendants' work, to give them a right to compensation.

8. The use which the defendants design to make of the streets in question, is wholly inconsistent with the purposes and objects of their original dedication. The plaintiffs have paid a full consideration for the right to the enjoyment of these streets to the full extent of their dimensions respectively, as originally laid out, and in the accustomed manner. They have a right to the injunction of this court, to restrain any use of the streets

Drake *v.* The Hudson River Railroad Co.

for purposes other than those originally intended, and which will impair the use and enjoyment thereof by the plaintiffs.

9. In considering the question of the rights of the plaintiffs and the damages they will suffer, from the acts of the defendants, the court can not enter upon the question, whether any public benefits may arise from the defendants' work, which might tend to counterbalance the inconvenience and injury it will produce. The violation of the rights of the plaintiffs, and the injury to their property can not be compensated nor vindicated by any benefit which another portion of the public may derive from the extension of the railway of the defendants.

10. The enclosing of Canal-street, and Hudson-street, within the rails to be laid by the defendants, and the permanent occupation thereof by the rails so laid, will constitute a *purpresture*; and the injury, inconvenience and annoyance therefrom and from the use which is intended to be made thereof by the defendants, will constitute a *nuisance*. From the injuries which will be sustained by the plaintiffs therefrom they are entitled to an injunction.

11. Under the charter of the defendants they alone can apply for the appointment of commissioners, to assess the damages. This power, given to the company, does not affect or impair any of the plaintiffs' remedies by action.

12. The defendants have no power under their charter to locate their road upon the streets in question without first obtaining the assent of the corporation of the city of New-York to such location. Such assent has not been obtained. The plaintiffs' rights will be invaded and their property injured by the illegal and unauthorized proceedings of the defendants, and they are therefore entitled to an injunction. In support of these several positions, Mr. Sandford cited numerous authorities. In reference to the unconstitutionality of the state law, he referred to the constitution of the United States, and the late and present constitution of the state of New-York; and to the case of *Bloodgood v. The Mohawk & Hud. Railroad Co.* (18 Wend. 9,) to show that the resolution there passed was not valid and binding, and was not a decision; and referred to the opinion of

Drake v. The Hudson River Railroad Co.

Senator Tracy in that case, as a sound exposition of the law on the subject. In respect to the necessity of prepayment of compensation, even when lands are taken for public use, he referred to the last mentioned and other decisions. To support the point that, in this case, if the defendants had a right to lay the road along the streets, they were bound to make compensation to those whose lands were affected, he referred to the charter of the company; and to prove that the plaintiffs had an interest in the streets, he referred to the terms of the several cessions, and to the act of 1813 for opening streets, and the several decisions establishing the principle that grants of lots bounded by a street convey in fact to the centre of the street.

Mr. Sandford further contended that private property could not be taken for public use, unless in case of extreme necessity; and to establish this, cited *Ruth. Inst. of Nat. Law*, pp. 41, 43. He also contended that private property could not in any case be taken for private use; and that in this case it was so taken.

In support of his various other positions, he cited numerous authorities, among which were 1 *Bald. C. C. Rep.* 230, 235, 236, 232. 3 *How. Miss. Rep.* 240. 1 *Kelly's Geo. Rep.* 524, 584. 4 *Paige*, 510, 513. 6 *Pet.* 431, 598, 513, 514. *Woolwich on Ways*, 60, 2, 53, 54. 10 *Pet.* 662, 713, 720, 723, 730, 736. 1 *Sandf.* 323, 341. 19 *Wend.* 659, 666, 675. 3 *Kent's Com.* 422, 433. 20 *Wend.* 129. 3 *Hill*, 469. 2 *Id.* 567. 5 *Id.* 170, 175, 176. 25 *Wend.* 162. 12 *Id.* 96. 9 *Id.* 576. 5 *Met.* 368. 1 *Gale & Davison*, 589. 1 *Rail. Cas.* 736. 7 *Scott's New Rep.* 835. 6 *Adol. & El.* 355. 2 *Coke's Inst.* 238. 8 *Dana*, 289, 294, 304. *The case of Hodgkinson v. The Long Island Railroad, not reported.* 2 *Black.* 215, 216. 2 *Dow's Par. Cas.* 519. 2 *John. Ch. Rep.* 463, 473. 1 *Barb. Ch. Rep.* 59. 5 *John.* 175. 5 *Cowen*, 165.

C. O'Conor, for the defendants. 1. The plaintiffs have not made out title to any part of the street. Whatever their rights are, they rest on the cession, and on the opening of the streets, under the act of 1813. On the face of the deeds to the plain-

Drake v. The Hudson River Railroad Co.

tiffs, it is a question of construction, as to whether one-half the street is also conveyed. In the country, the deeds invariably convey one-half the road; in the city, they usually exclude the street. The bill does not show that the street was included in the grants to the plaintiffs; nor that, in any description in the deeds, the streets are granted, or bounded by the lots. The framers had in mind the question of priority, to the cessions to the corporation. The case shows that the corporation of the city have become owners of the streets; and that recently Mrs. Drake has become owner on the streets. Mrs. Drake became lessee for 99 years, in 1804, and became owner of the reversion in 1823; the cession to the corporation of the city was in 1813.

2. As to prepayment of compensation to the plaintiffs, where is the proof that they are the fee simple owners? Trinity Church had granted the streets to the corporation in fee, in trust for the whole public; and therefore she could give no further right. The plaintiffs have failed to show a title to the streets.

3. As to the allegation that the corporation have not granted the right to the defendants, he admitted the vote of eight to five in the board of aldermen, and the right of the court to look into the proceedings, in reference to their validity; but contended, that the restriction on which the plaintiffs' point here is founded, does not apply to the mere assent of the corporation to use a public street; for a mere assent to what otherwise would be an invasion of corporate rights, is not *law*; and that the provision of the charter, as to this, does not take effect till 1st of January, in the year 1850. [Court. What is the difference between a law and an ordinance?] A law is a general rule; ordinances are mere regulations as to their officers or property, not in general force. A resolution may apply to any thing, not general to *all* the community. The word ordinances has been applied to acts of the corporation, as *statutes* to acts of the legislature. The word resolution covers what may not be laws or ordinances. That which operates on a particular individual, is not a *law*. [Edmonds, J. referred to the sixth section of the charter, which mentions that a resolution, unless returned, shall become a law.] Mr. O'Conor admitted the verbiage, and the embar-

Drake v. The Hudson River Railroad Co.

rassment in construing the law, which he declared to be absurd and nonsensical. Mr. O'Conor further stated that the confusion of the statute must excuse him for asking the court to give it effect, according to its rational spirit and meaning. He contended that for all purposes of administration, it was to go into effect on the 1st day of January, 1850; and for certain special necessary purposes, it went into effect on the 1st of January last. He admitted that this position could not be maintained by its literal expression; it was necessary that, for certain purposes, it should take effect before January, 1850. The 27th section repeals all provisions of law and charter inconsistent with the act; all not inconsistent are to remain in force. From this, a speck may be got to redeem the act and construe it rationally. The part of the old charter and laws, as to administration, may endure till January, 1850, and be consistent with the act and its spirit; they may remain till they come in conflict; the very letter would repeal it instantly. He contended that the third section showed that the common council, of which the act speaks, is not the present common council; and covers the whole ground, as to the time when and the manner in which the act shall take effect. They are not to enter on their duties till January, 1850, not before they are born. The defendants have a right to ask a natural construction of these incongruities; and, if necessary, to rule down an expression. The re-organization refers only to the time when the new aldermen shall come in; it was the aldermen of one year, not those of two years, who failed to give a majority. This provision does not apply to the present common council; and, if it does, the assent is not a *law* or ordinance.

4. As to the pre-payment of compensation for supposed or *consequential* damage, Mr. O'Conor contended, that there was nothing in the incorporation requiring or warranting this. The power given is to *take* the land, not *injure* it; it gives the right to take, enjoins the duty to pay for it; to do so simultaneously; requires that when their *operations injure* the land, they must compensate for the injury. The legal principle is, that no more land be taken than is necessary. The injury or damage must

Drake v. The Hudson River Railroad Co.

be *physical*. For land *physically* affected, appraisers may be appointed ; for instance, in the case of digging through a hill, or taking down or damaging a house ; these are physical, not consequential injuries. The injury meant, is injury by the *operation* of the work, not injury to a man's business ; not consequential, as meant by the counsel for the plaintiffs. The owners may be injured, and the property not injured ; that injury to property is meant, otherwise an *absolute* absurdity is involved.

5. It is not a *condition precedent*, but a privilege to the company, to *include the injury* in the appraisement ; for consequential injury, they would be liable ; may run the risk as others would ; they would be trespassers, and where immediate physical injury would result, might be restrained. Possibly this might be the case here. (*See the defendants' act of incorporation, and the case of Bloodgood v. The Mohawk & Hud. R. R. Co. 18 Wend. 9.*) The resolution in that case was adopted as a principle of law ; the judgment of the court, that pre-payment is necessary, was reversed. The resolution is authority ; for if the legislature had not the power to authorize the laying the road in the streets, the decision of the point of pre-appraisement, &c. was unnecessary ; the principle of the resolution is involved in the decision.

6. As to the objection that it is a *nuisance*, or a *purpresture*, see 8 *Dana*, 299, for a definition of the latter, and the affidavit of Mr. Coddington, to prove the contrary. H rails do not constitute a *purpresture*. The railroad is a great public benefit. The greater portion of the community are accommodated thereby ; and the fact that a small number of people are inconvenienced does not constitute the road a *nuisance*. Those who ride in their own carriages, or whose business is injuriously affected by the laying of the rails in the streets are a minority. Railroads are a part of the history of the times ; we have by it a connection with the great west, by the *Harlem railroad* ; it now runs to the very vestibule of justice, (the *City Hall*;) it is the present common law ; Chancellor Kent has observed that it was the comfort of his old age. Lamp posts and cobble stones are

Drake v. The Hudson River Railroad Co.

ancient, but it can not therefore be said that they are useful, nor that improvements are not therefore to be admitted. Improvements for accommodation must be admitted; unless on the whole detrimental to the community. Though shocking accidents by railroad will occur, yet by comparison they will be found less attended by these than other ways are. The common law adapts itself to the age; if a railroad cause injury, the remedy by action on the case is sufficient; that railroads in themselves are not pernicious, see 8 *Dana*, 299, and 9 *Paige*, 171.

7. To a *moderate extent*, diminishing the accommodation of the public, for the better accommodation of a larger portion of the public, does not involve the invasion of private right or public right. (6 *B. & C.* 566.) There must be some authority and principle governing the use of highways by every species of carriage, which the legislature may authorize, and may be susceptible of introduction on the highways. It may be improper to admit steam in the streets, but that question is not before the court. The carriage is a car somewhat longer than an omnibus; each car has its distinct pair of horses; it is propelled by horse power as other omnibuses, and when a foot passenger or carriage is desirous of passing, it is exactly known where it comes and travels. Not so with omnibuses; they sweep the whole street, liable to be on you at any place, and so as to any other carriage. True, railroads have a track which may not at some times be as easy to pass over as other parts of the streets, but no serious difficulty is proved. The court is capable of looking into the matter themselves.

8. Corruption in the defendants' witnesses has been imputed, but of this there is no evidence. The affidavits say the railroad will be a depreciation to property; but the defendants' affidavits prove the contrary. Mr. West, one of the plaintiffs, thinks it will be an injury; his landlord thinks otherwise, and correctly, for at the end of the lease of Mr. West the property will advance, and Mr. West can not then get the property at as low a rent as now. In this conflicting state of facts, the court can not say the road is a nuisance. (4 *Mylne & Craig*, 249.) The

Drake v. The Hudson River Railroad Co.

court of chancery will not interfere with the opinion of public functionaries, unless it interferes with private rights. (6 *Paige*, 134.) The opinions of persons not experts, are not entitled to weight. The opinion of the common council is, that the opinions of persons who were not experts were against the defendants, but the opinions of experts were in their favor.

9. This is not a proper case for a preliminary injunction; the right to interfere is on dubious equity; if wrong, the defendants are liable to indictment and suit. (2 *Story's Eq. Jur.* 922 to 934, n. 1; 254 of 4th ed. 6 *Paige*, 563. 7 *John. Ch. Rep.* 335. 4 *Paige*, 248. 4 *John. Ch. Rep.* 55. 9 *Paige*, 23. 1 *Barb. Ch. Pr.* 37, 608. 4 *Paige*, 248.) The prayer of the bill is for an injunction, not for a preliminary injunction; if it should be that private rights are invaded, that fact must be established by proofs, at the trial; if so found, the damage can be compensated fully, by ordinary proceedings at law; if otherwise, it would be impossible to compensate the company if the injunction be issued. If the running is unlawful, all persons are liable, criminally and civilly; all who are connected, all the officers and agents; and this gains force, because it is not the railroad company and the plaintiffs who sue in the contest, but the company and all the concurring adjacent proprietors and the plaintiffs and the non-concurring proprietors, and the latter portion alone can suffer by the company.

D. Lord, for the defendants. 1. The time when this application for injunction was made, being over a month after the sanction by the corporation of the city was given, (it was on Sept. 25th, and the complaint was sworn to on Oct. 31st,) it was too late. If the plaintiffs forbore till the rails were laid, and till the time when an injunction would be severely injurious, it was their own fault. And although for final relief, the complaint might be well founded, yet, on this ground, it would not justify a motion for a temporary injunction. (*Hodgkinson v. The L. I. Railroad Co. not reported.*)

2. No authority exists for granting a preliminary injunction;

Drake v. The Hudson River Railroad Co.

the injunction sought for is not against running the cars, but against the road.

3. The object of the road is the public good, not private advantage or for the adjoining inhabitants; it is to increase travel—it is for the whole public; not of the city only—but the whole public. It may be inconvenient for carriages, but is calculated to promote trade and commerce. The question is not to be determined by majorities. As to nuisance this is a mixed question of law and fact; and not for opinion. The fact must be stated. All concede that this rail can be passed; it is a track in the middle of the street; carriages can only be damaged by rapid passing, not by moderate passing, as the law requires.

4. The railroad is not a nuisance; it can be laid without being such, in the streets. They have been laid in almost every street and village in the Union—Boston, Philadelphia, Baltimore, Washington: the idea of compensation was never urged. If so decided, the decision would disturb more property, and do more to retard the advancement of the country than any other single judgment could occasion. After the act of incorporation this road can not be called a nuisance; the mode of constructing it is not pretended to be such; and public acts can not be ridden over because private property is taken.

5. The illegality of the consent or non-consent of the corporation, does not entitle the plaintiffs to the injunction, because such illegality or non-consent does not make the road a nuisance; the corporation exceeding their power, does not thereby make a nuisance; nor confer power to obtain an injunction.

6. The assent of the corporation is not an act of legislation; it is a mere right of veto or assent. This is not legislation; it is only to legalize, as in the case of a will, &c. requiring assent to a marriage.

F. B. Cutting, in reply. 1st. Would the company, without the authority of the corporation, have had the right to lay their railroad in the streets? 2d. If they, without such authority, had not such right or capacity, have the corporation so legislated as to have conferred such right or capacity upon them; and 3d. If

Drake v. The Hudson River Railroad Co.

they have not so legislated, have the plaintiffs the right to apply to stay them in breaking up the streets? The object of the act of the legislature was only to receive the *concurrence* of the city corporation: for without such concurrence, the act, as to the city, is void—is void for want of providing for pre-payment of compensation to those injuriously affected or damaged. The legislature has not the right so to convert the streets, without the consent of the corporation, unless pre-payment be first made; and, if without such permission the company lay the rails, the owners have a right to enjoin them. (6 *John. Ch.* 429.)

As to the second question—after referring to § 4 of the charter of the company, and to § 5 of the law of 1848, he contended that the assent or consent (both words are used in the statutes,) requires *legislative action*—not *executive*, or judicial action. It is equivalent to the grant of an incorporeal hereditament to the defendants, to carry out the purposes of the charter; this power resides in the two boards under one or the other of the city charters; consent can only be given by authority of both; which consent of both constitutes the act of legislation; and when completed by the concurrence of the mayor, it becomes a law—is binding; it is equivalent to the word authority; primitively, the word *assent* means *to concede*; and to *concede* is to grant. As to the 4th section of the city charter of 1849, a difference is alledged between the word *law*, the word *ordinance*, and the word *resolution*. The defendants contend that an ordinance, or resolution may be passed by a mere majority of the members *present* of the respective boards of the common council; that it is then valid, though not passed by a majority of *all the members* elected! By referring to the old charter, and the various sections in this charter, the latter is capable of a reasonable construction. (He here read § 10 of the old, and § 6 of the new charter; the latter, to show that the word *law*, as employed therein, was meant to include ordinances and resolutions as well as general laws. The section provides, that unless the mayor shall return a *resolution* within a specified time, approved or disapproved, it shall become a *law*.) He further contended, that the spirit and intent of the clause requiring a ma-

Drake v. The Hudson River Railroad Co.

jority of all the members elected, to pass laws, ordinances and resolutions, and requiring the mayor to have the privilege of approving or disapproving, was to prevent hasty legislation ; that, if improper, the mayor might return it, *with his reasons* for disapprobation ; that they might, with those reasons before them, *re-consider* the subject, before finally deciding upon it ; and that, as to this act of assent, the charter of 1849 was in operation when the resolution in question was passed ; and, in support of this he analyzed and examined the several sections of the act ; read the 27th section, repealing, in express terms, the 7th section of the charter of 1830, and the sections repealing all provisions of law and charter inconsistent with the act of 1849, and the section declaring that the law of 1849 should go into effect on the 1st of June of that year, and contended, therefore, that the 4th section, requiring the vote of *all the members elected* to pass resolutions, (or laws, as contended by the defendants) went into effect on the last mentioned day ; that the provision in the 6th section referring to the 12th and 13th sections of the old charter, meant, the *mode* of sending it to the mayor, and by inserting the words "and sent to the mayor," which is the fair implication of the provision, the intent is truly expressed, and the true construction given. Unless that construction be adopted, there is no provision for sending the ordinance to the mayor ; or two modes of legislation exist, one with the privilege of *veto* to the mayor, and one not. But with the construction above mentioned, the act is reconcilable, and is similar to the provisions of the state constitution. It leaves the resource of a re-consideration, with the reasons for objection. To take away the mayor's power of *veto*, would be a fundamental change, never contemplated by the framers or passers of the act ; a decision that such is the effect of it, would, indeed, astonish the whole community. Every purpose of public policy requires, that the section requiring a majority of all the members elected, (the 4th section) should take effect on the day last mentioned ; and there is no conflict or incongruity in giving it immediate effect.

If the company work any part of the street, supposing the law and the assent of the corporation of the city legal, it can only

Drake v. The Hudson River Railroad Co.

be on pre-payment of the compensation for the injury, consequential or immediate ; and unless pre-payment be made, the owners are entitled to the injunction. Under the cessions from the church, the owners are *cestui que* trusts, who have paid full value ; having a special interest, a special right, having paid more than the public at large. As to so much of the street as was opened by law, the expense was compulsorily paid by the owners ; because, as was alledged, they derived a special benefit, not paid for by the public at large ; they had, therefore, a special right to complain. Assuming that the plaintiffs' lands were injured, or injuriously affected, the owners are entitled to compensation ; and if so, they are entitled to pre-payment. Waiving, for the present, the common law principle, that he who so uses his property as to do damage to his neighbor, must answer for it, the argument of the defendant is, that no compensation can be given unless there is a physical damage, as a bank caving in, or a house destroyed by the operation of constructing the road. In the acts of incorporation, four cases of injury are mentioned ; lands taken ; damages to lands adjoining ; to houses thereon ; property affected by any operation connected therewith. Lands injuriously affected are included ; the injury must be compensated for, and by pre-payment. For instance, in the case of a railway between the wharf and the land ; the wharf is affected ; there is no difficulty in describing the damage ; the acts provide for it ; the jury are to take a view, that by ocular demonstration, *remote* claims of consequential injury be not interposed ; if the claim is imaginary the jury will so find it, (See the *Massachusetts Railway Act*, *Rev. Stat. Mass.* 344 ; 3 *Metc.* 380 ; 5 *Id.* 368 ; 1 *Gale & Davison*, 589 ; 6 *Ad. & Ellis*, 365 ; 25 *Wend.* 462 ; 2 *John. Ch.* 162 ; 1 *Adol. & Ellis*, 168, 776.) Pre-payment of compensation was indispensable. It has been said by the opposing counsel that the case in 18th Wendell has settled the right of the public to take private property ; and that the common law is founded on a system which constitutes its glory ; that it is expansive, and adapted to the improvement of the age. The right of the public to take private property, by paying just compensation for it, and by pre-payment and the declaration

Drake v. The Hudson River Railroad Co.

above mentioned, as to the common law, Mr. Cutting agreed to; but he protested against the doctrine of taking the property of one to give it to another; when the common law shall expand so far, it will become necessary to shrink it. In the days of Ld. Coke, to do so would have been indictable; if it is necessary to take or injuriously affect private property, just compensation must first be made; and the act of taking it even for public use, should be jealously watched. In England, the example of the judiciary was worthy of all admiration and imitation, in standing by the rights of property, though connected with an arbitrary government which was burdened with a mighty debt. The colossal power of England is maintained, in consequence of the upright, fearless and firm manner of the judges, in administering the law; though mighty influences surround them, they have uniformly required that compensation by pre-payment be made for private property taken for public use. As to the objection that the complaint does not pray for a preliminary injunction; it is in fact for such an injunction, and that it may be made perpetual: the prayer is for both kinds. The assertion that the injunction should not issue, because the defendants may be indicted for a nuisance, is not tenable; for indictment is an act of public justice, the prosecution here is for private rights—and for this he referred to the authorities cited by Mr. Sandford. It is said that, now that the rails are down, the injury to the defendants (if the injunction issues) will be irreparable. This cannot be, for they then can go to Canal-street—at which street the New Haven Railroad stops; and if it were so, it is their own fault; the rails were put down after full notice as to plaintiffs' rights, and (except as to Canal-street) after the complaint was prepared and served; they were put down with railroad speed—large bodies of men were employed night and day; if they had no right before, they have no right since the rails were down to use the street; and again, it is doubtful if the complaint could be maintained if made before the nuisance was commenced; the motion should be granted on its broad merits. The decision should be made on the broad principles of justice; the case is entitled to the gravest and most careful con-

Drake v. The Hudson River Railroad Co.

sideration; it involves great fundamental principles, which should be boldly, fearlessly, and correctly met, not left as open questions, nor evaded, and not decided by the subordinate and immaterial consideration, as to whether the rails are down, or were put down before or after the complaint was made, or before or after notice of the plaintiffs' rights.

There cannot be a doubt that there is a practical encumbrance in the streets, an embarrassment created, which if unauthorized should be removed. Is there a doubt that it is a nuisance? Even if the company had the right to lay their rails, they should so have laid them as to occasion the least possible injury.

JONES, P. J. The acts of the legislature referred to by the plaintiffs in their complaint, authorized and empowered the stockholders of the Hudson River Railroad Company to construct a single, double, or treble railroad, or way, between the cities of New-York and Albany, commencing in the city of New-York, with the consent of the corporation of that city, and passing through the counties therein mentioned, and ending at some point on the Hudson river, in the county of Rensselaer, opposite the city of Albany, to be laid with an iron rail of the weight therein mentioned, and to transport, take, or carry any property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them, for the term of fifty years from the passage of the act of incorporation. The 4th section of the act authorized them, after one half of the capital stock should have been subscribed, and five per cent thereof paid in, to exercise the powers and privileges conferred upon them by the act; and that thereupon the directors might appoint an engineer or engineers, and cause to be made such examinations, surveys and maps for the said railroad as might be necessary to the selection by them, of the most eligible line or lines for the location of the road, but requiring that the same be located within the limits, and in the manner therein prescribed; and providing that the directors, after such examinations and surveys were made, should select, and by certificates drawn on suitable maps, under their hands

Drake v. The Hudson River Railroad Co.

and seals, designate the line, course, or way they might deem most advantageous for the said railroad, which certificates should be filed in the offices for that purpose, described in the said act; and that the line, course or way so selected and certified, should be the line, course or way on which the said corporation should construct or make the said railroad. The same section of the act provides and directs that the said directors may locate their said railroad on any of the streets or avenues of the city of New-York, westerly of and including the Eighth avenue, and on or westerly of Hudson-street, provided the assent of the corporation of said city be first obtained for such location, and said railroad company should not infringe upon the rights or privileges of the Harlem Railroad Company theretofore incorporated.

By the 7th section of the act, the said railroad company or corporation was empowered to purchase, receive, and hold in fee simple such real estate and other property as might be necessary in accomplishing the objects of the incorporation; and also to receive, take and hold such voluntary grants and donations of real estate and other property as might be given them to aid in the construction, maintenance and accommodation of said railroad, but which real estate should be held and used for those purposes only.

By the 10th section of the act, the corporation was empowered by their engineer or agent to enter upon any lands or water for the purpose of making surveys, and by their engineers or agents to enter upon, take possession of, and use all such lands and real estate as might be necessary for the construction and maintenance of the said railroad, and the accommodations required appertaining thereto, but that all real estate thus entered upon not voluntarily granted or given should be purchased by the corporation of the owners at the price to be mutually agreed upon between them. And in case an agreement could not be made between said corporation and the owners of any property which might be required for said purposes, or which might be affected by any operation connected therewith, the compensation to be made therefor should be ascertained, assessed and paid in the manner prescribed by the act.

Drake v. The Hudson River Railroad Co.

By the act of February 10th, 1838, further to amend the original act, compensation is to be made for the lands, real estate, and property thus taken possession of and used for these purposes, and not voluntarily given to or purchased by them, in the manner following: The corporation may present a petition to the proper court, setting forth the same, and praying for the appointment of commissioners to ascertain the compensation to be made therefor; and the court, on such application and due notice of presenting the same, are to appoint five competent and disinterested persons commissioners to ascertain such compensation, who after hearing the parties and viewing the premises, shall ascertain and certify the compensation proper to be made to the owners and parties interested, for the land, real estate, and property so to be taken or injuriously affected, as aforesaid, without any deduction or allowance on account of any real or supposed benefit or advantage which such owners and parties interested may derive from the construction of said road. The commissioners are to make, subscribe, and file in the office indicated by the act, a certificate of their said ascertainment and assessment, containing a description of the premises for which such compensation is to be made; and the court, upon such certificate and proof that such compensation in the sums certified has been paid to the parties entitled thereto, or deposited in bank as authorized by the act, shall make and cause to be entered in its minutes a rule describing the lands, &c. such ascertainment of compensation, with the mode of making it, and such payment or deposit of the compensation as aforesaid, a certified copy of which is to be recorded in the offices indicated by the act, in the like manner and with the like effect as if it were a deed of conveyance from the said owners and parties interested, to the said corporation; and upon the entry of such rule the said corporation shall become seised in fee of the lands, real estate and property described in it, or required to be taken as aforesaid during the continuance of the corporation, and may take possession of, hold and use the same for the purposes of said road, and thereupon shall be discharged from all claims for damages by reason of any matter specified in the said petition, certificate or rule of court.

Drake v. The Hudson River Railroad Co.

Under these powers, privileges and provisions, the stockholders proceeded to organize their corporation, and to locate the line of their road, and in some sections of it acquired the lands and real estate required for the construction of the road and their track thereon. In the month of May, 1847, availing themselves of the power and provision in the act in that behalf contained, the company, with the assent of the corporation of the city, located their said railroad on the Eleventh avenue of the city of New-York to Thirty-second-street, and thence through other streets and avenues to and through West-street to Canal-street; and afterwards, on the 14th May, 1849, applied to the common council for the assent of the corporation of the city to lay a double track railroad, and run their trains of cars from the Tenth avenue through Fourteenth-street and Hudson-street to Chambers-street. The board of aldermen, on the 1st day of August, 1849, by a vote of eight members in the affirmative, against five members in the negative, passed a resolution to the effect that the defendants, the Hudson River Railroad Company, be authorized to lay down a double track of rails, with suitable curves and turn-outs, from the northerly line of Canal-street, at West-street, through Canal and Hudson streets to Chambers-street, under the direction of the street commissioner, and subject to all the restrictions, obligations and provisions of the ordinance authorizing said company to lay down rails to Canal-street. The president of the board objected to the resolution as not being in conformity to the provisions of the new or amended city charter, and that it could not be sent to the board of assistant aldermen as having passed the board of aldermen. From his decision an appeal was taken, and by a like vote of eight members to five the appeal was sustained, and the resolution declared to be adopted. It was then sent to the board of assistant aldermen for concurrence. The board of assistant aldermen concurred in the resolution by a vote of thirteen members in the affirmative to four in the negative, and it was afterwards approved by the mayor of the city. The company, by their agents, pursuant to the assent given them by the said resolution, commenced to lay down the double track of their said railroad, under the

Drake v. The Hudson River Railroad Co.

direction of the street commissioner, in and along Canal-street, between West and Hudson-streets, and were preparing to continue the same to and through Hudson to Chambers-street, when the plaintiffs took their incipient measures to arrest the work as unauthorized by law, and injurious to them; complaining of it, moreover, as a nuisance, and averring that real estate and property vested by law in them had been taken for the location and construction thereof, without making compensation to them therefor. The double track of rails occupy about 16 feet of the middle or center of Canal and Hudson-streets, and in some parts of Hudson-street, between Duane and Chambers streets, approach to within about seven feet, and at one place it is said to about four and a half feet from the side walk. A number of affidavits have been read by the plaintiffs for the purpose of showing that the double track of rails obstructs and impedes the crossing, and the free and full use of the streets; that it injuriously affects their property in various ways, and that it is a nuisance to them, seriously impairing the value of lots fronting thereon, and endangering the safety of life. These charges and complaints are repelled by affidavits on the part of the defendants, which represent the railroad as a desirable improvement, of great public utility, creating no injurious obstructions to the use of the streets for ordinary purposes, causing no danger to those using the same, and free from the objection of injury or inconvenience to the owners and occupants of tenements and lots fronting the streets through which it passes. It is affirmed, and not denied, that the location of the track from West through Canal and Hudson to Chambers-street, and the laying down of the rails therein, was commenced by the agents of the company before the plaintiffs' complaint was served upon them; but it is conceded that the same was done, with notice of the objections of the plaintiffs thereto, and that the operation of laying down the rails was continued after service of the plaintiffs' complaint upon them. This court is asked for an order or injunction restraining the said defendants from laying down a double track of rails, or any track of rails, single or double, of any kind whatever, from West-street through Canal and Hudson to Chambers-street,

Drake v. The Hudson River Railroad Co.

or any where within the said limits; and the further prayer of the plaintiffs is, that the said order or injunction be perpetual, and that the said defendants may be ordered to remove and take away so much of the said tracks of rails as they have laid, or caused to be laid down in Canal-street, or any part of Hudson-street, on said route from West to Chambers-street.

The first ground of complaint is, that the defendants occupy grounds for the track of their railroad laid down by them in said streets, which belong to the plaintiffs either in fee or for the unexpired residue of terms of years, which have been taken and used without compensation to them, the plaintiffs, therefor, or for their right and interest therein. The answer to the objection is, 1st. That no lands, real estate, or property within the limits of those streets, have been taken for the said railroad, but that the parts of said streets occupied by the tracks of said railroad, are so occupied and used, by and with the consent of the municipal government of the city, to which the regulation of the public streets of the city belongs, and for the purposes of travel and the accommodation of the public, to and for which the lands forming the street were dedicated by the original owners to the public, or purchasers, or acquired under and by virtue of the laws of the state, for public purposes. And 2d. The claim of the plaintiffs to the soil and grounds within the streets, and forming the same, or to a legal estate either in fee or for any residue of any terms of years therefor, is contested by the defendants, who aver and insist that the same was and is vested, wholly and exclusively, in the corporation of the city, subject to the public use thereof as streets, and under whom they, the defendants, claim to occupy and use the same for the said railroad. The plaintiffs have shown no title in themselves, or in any or either of them, to the legal estate, either in fee or for any lesser estate or term of years, in any part of the lands or soil within the limits of Hudson or Canal-street, and it is admitted that no grant or lease exists, or ever did exist, to them, in express terms therefor; but they represent that they respectively are purchasers of the fee, or lessees or assignees of leases for terms of years, of and for lots fronting to the said streets,

Drake v. The Hudson River Railroad Co.

and bounded thereon, and derive such their titles to the said lots from the corporation of the rector and inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the state of New-York, who were the owners and proprietors in fee simple thereof; and they insist and claim, that the grants in fee or leases of the said lots, being bounded on the said streets, by operation of law, extended to the middle or center of the street, and passed to and vested in the grantees or lessees the legal estate and interest in the parts of the streets in front of the said lots, and extending the width of the lots to the center of the street, subject to the dedication of the same to public uses, as, and for a street. It is stated, and not denied, that the corporation of the rector and inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the state of New-York, prior to the year 1797, were in the possession, and claimed to be of right the sole and exclusive owners in fee simple of a large tract of land in the city of New-York, extending from Chambers-street to and beyond Canal-street, within which Hudson-street from Chambers to Canal-street was included, and which had been laid out into streets and lots as mentioned in the complaint, that the said tract of land was from time to time, as the compact part of the city extended, at different times laid out by the said rector, &c. the said owners thereof, into lots and streets, for city purposes, and that Hudson-street from Duane-street, then called Barley-street, to Canal-street, was one of the streets so laid out and designated for a public street; and that the lots of land so laid out, and which fronted on said Hudson-street, or some of them, were sold and conveyed by the said corporation of the rector, &c. to purchasers in fee, or leased to lessees for terms of years, and that the same were in and by the deeds or leases thereof, fronted to and bounded on the said street.

It is not denied that the grantees and lessees acquired by their grants and leases a right of way in and over the street on which their lots were bounded, commensurate in its duration with the estate in the premises granted or leased to them thereby. Those streets gave them their access to those lots, and

Drake v. The Hudson River Railroad Co.

were necessary for their use and accommodation, in the enjoyment of their said lots, and the appropriation and application of the same to the purposes of residence, and business operations. Whether the legal estate in the soil of the street, in case the same resided in the grantors at the time of the sale and conveyance or lease thereof, would by operation of law pass to and vest in the purchaser in fee, or the lessee for the term granted by the lease, or not, is a question, which in any view of the case, does not arise, and is not necessary to be examined in the present case, and I express no opinion upon it. The complaint states that the land laid out for Hudson-street, from Barley-street to the pasture farm at Moore-street, on the north side of the intended square called Hudson Square, and being in width 90 feet, designated on a map of the same by the corporation of the rector, &c. as and for a street, was by an instrument in writing under the corporate seal of the said corporation, and bearing date the 20th June, 1797, granted and conveyed by the said corporation of the rector, &c. for the consideration expressed therein of five dollars, to the mayor, aldermen, and commonalty of the city of New-York, to the intent, nevertheless, and in trust that the said streets be kept open for the use of the citizens of the city of New-York forever. And that the said corporation of the rector, &c. by another instrument in writing, duly executed under their corporate seal, and bearing date the first day of December, in the year 1813, after reciting that by recent regulations relative to public streets, divers pieces of land belonging to them between North Moore, and Christopher streets, were intended to be used as public streets, and that they had agreed to grant and cede the same for that purpose, in consideration of receiving to their own benefit a certain other piece of land theretofore used as a highway, and no longer intended to be so used, did, in consideration of the said agreement, and of the sum of one dollar therein expressed, grant, bargain, sell, and convey unto the mayor, aldermen, and commonalty of the city of New-York, among other pieces or parcels of land, the piece therein described as Hudson-street, with the breadth of ninety feet from Christopher-street, to the line of the lands of Anthony

Drake v. The Hudson River Railroad Co.

Lispenard, and from Watte-street with the same breadth to Vestry-street, and then with a breadth of 86 feet 6 inches to North Moore-street, to have and to hold the same, unto the said mayor, &c. and their successors, for ever, for public uses, in like manner as the other streets of the said city are used. These deeds are before us, and clearly purport to convey to and vest in the corporation of the city of New-York, the lands composing the parts of Hudson-street therein respectively mentioned, for public use, as streets of the city. It is admitted that the portion of said Hudson-street extending from Duane-street, formerly Barclay-street, to Chambers-street, and the portion of said Hudson-street extending from Laight-street across Canal-street to Spring-street, were opened by the mayor, aldermen, and commonalty of the city of New-York, under and by virtue of the powers and authority conferred upon them by the act of the legislature of the state of New-York in that respect, in the complaint mentioned, and that the value of the lands taken to form those portions of said Hudson-street, were assessed upon and paid by the owners of lots and property deemed to be benefited thereby, as in the said complaint mentioned, and not by the corporation of the city. The portion of Canal-street, between Hudson and West streets, is understood to have been also opened by the corporation of the city, under and by virtue of the powers and authority conferred upon them by law, and the value of the lands taken for the purpose of forming the same assessed upon and paid by the owners and parties interested in the lots and parcels of land deemed to be benefited thereby, in proportion to the benefit and advantage thereof to them respectively, and no part of the same to have been paid by the corporation of the city. But it is expressly enacted and provided by the acts of the legislature, authorizing the corporation to cause public streets to be laid out and opened, and the lands of individuals to be taken for the purpose, and the value of the lands so taken to be assessed upon the persons benefited by the improvement, that on the final confirmation of the report of the commissioners of estimate and assessment in the premises, the mayor, aldermen, and commonalty of the city of New-York,

Drake v. The Hudson River Railroad Co.

shall become and be seized in fee of all the lands, tenements, hereditaments and premises in said report mentioned, that shall or may be so required for the purpose of laying out and opening the said street so laid out and opened, or for the purpose of extending, enlarging, or otherwise improving the street so to be extended, enlarged, or improved, and that the said mayor, &c. may thereupon, or at any time thereafter, take possession of the same, in trust, nevertheless, that the same be appropriated and kept open for, or as part of a public street for ever, in like manner as the other public streets in the said city are, and of right ought to be. The plaintiffs can consequently have or claim no right or title to the legal estate of the portions of Hudson and Canal streets taken by the corporation of the city, by authority of law, for the purpose of laying out and forming or opening the same. They have, I think, shown no sufficient title or right in themselves, to those parts of Hudson-street laid out by the corporation of the rector, and inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the state of New-York, and dedicated by them to public uses as a street. That corporation, by the deeds mentioned in the complaint, conveyed the lands forming those portions of that street to the mayor, aldermen, and commonalty of the city of New-York, and vested the same in them and their successors for ever, in trust, for public uses as a street. Two of the plaintiffs, Rohr and Stewart, state their tenements and lots to front on Canal-street, the former as being held in fee, the latter for the residue of thirteen years of an unexpired term. Neither of them can have any pretence of claim to the legal estate and title to the lands taken to lay out, form, and open Canal-street. The other three plaintiffs, Susannah Drake, Andrew Bowden, and William West, state their premises to be on Hudson-street; of these, Susannah Drake represents her tenements to consist of a lot with a three story dwelling house thereon, in fee simple, on the west side of Hudson-street, now known as No. 141 Hudson-street, the sources or origin of her title are not disclosed in the complaint, but it is stated, and not denied, that she acquired her right to the fee in the year 1821, which was long subsequent

Drake v. The Hudson River Railroad Co.

to the conveyance of the street to the corporation of the city. She represents, however, that those under whom she claims, and from whom she derives her title, had a previous lease for the term of 99 years, given in 1804, long before the deed to the city corporation. That lease is stated to have been given to the lessees therein named, and to have come by divers mesne assignments to the said Susannah Drake and two other persons. The co-assignees are not before the court; they are not parties to the suit, and do not complain of the railroad. They probably have now no interest therein, and she has become and is the sole owner of the whole. She claims to be the owner thereof, and in the complaint alledges herself to be seised thereof in fee; and as respects her, she by accepting a conveyance in fee of the lot, has suspended the lease and extinguished all the right and interest under it. Whatever may have been her right to the legal title to the lands within the limits of the streets, under or by virtue of the lease held by her as assignee, as to which we purposely avoid all inquiry, those rights were commensurate only with the leasehold interest. The fee of the land subject to the lease, if it attached thereto, was in the corporation of the rector, &c. and was conveyed by them to the mayor, &c. of the city. When she accepted the deed and took the fee, the lease was necessarily merged or discharged, and the leasehold interest, as to the lot conveyed to her, merged in the fee and extinguished. She took the lot in fee, but could not take the fee of the land comprised within the limits of the street, for that had been already conveyed to and vested in the mayor, aldermen, and commonalty of the city of New-York; the extinguishment of the term left the fee freed, and discharged, from it and the lease, for the benefit of her, the said Susannah Drake, the grantee of the lessee, as to the lot; and for the benefit of the city corporation, the grantees of the fee of the land within the street, as to the land within said streets. The clause in the deed of conveyance to her, the said Susannah Drake, importing that it was subject to all subsisting rights under the lease, can not vary the case: it could only refer to the other co-owners of the leasehold interest, and to rights compatible with the estate in fee.

Drake v. The Hudson River Railroad Co.

Again; in whomsoever the title to the land within the street may have been vested and had resided, all parties agree that the land itself had been dedicated by the corporation of the rector, &c. the former owners thereof, to the public as a street, for public uses as such. Whether that dedication was by the deed to the mayor, aldermen and commonalty of the city of New-York, vesting the title in them in trust for those public purposes, or by the act and operation of laying out their said lands comprising the streets into city lots, and designating the streets on the map thereof, and by the sale and lease of lots fronting thereon to purchasers and lessees, thereby rendering the dedication thereof irrevocable, the right of the public to the use thereof as a public street, would be equally clear, vested and irrevocable, and however the fee might vest, the present right as well of the public at large as of the owners of property fronting on and bounded by the street, whether the legal title continued in the original proprietors or passed to the purchasers of the lots, or vested in the corporation, would be to the free use and benefit of the street, for the purposes of a public street of the city; and the same could be diverted therefrom or appropriated to any other use or purpose by neither. The city corporation, on the assumption of the title being clearly vested in them, would be equally unauthorized and without the legal capacity to discontinue or close the same as a street, unless under the special powers, and in the cases and on the terms prescribed by law, and any enclosure thereof, or obstruction amounting to an exclusion therefrom, of those entitled to the use thereof, or so impeding them therein as to injuriously affect their pursuits or interests in reference thereto, would be a nuisance, abatable or punishable as a nuisance, by or at the instance of those who might be specially endangered or aggrieved thereby. That these plaintiffs have rights in these streets, and an interest in the maintenance of them in their integrity, is undeniable; it is equally clear that the right and interest they have in them consists in the use, benefit and enjoyment of them as public streets or highways, for the legitimate uses and purposes of streets of the city. They have no private or exclusive right to, or prop-

Drake v. The Hudson River Railroad Co.

erty in, the use or enjoyment of them. The legal title to the land, subject to the public use if they possessed it, would give them no right to divert it to private uses, or to preclude the public or individuals from, or obstruct or embarrass them in, the use thereof for legitimate purposes, in any mode or manner, though new or of recent invention or introduction, if allowed by law and consistent with the object and purpose of such dedication. The corporation of the city, acting by the common council, have, by the provisions of the charter of the city, never abrogated and yet in force, and other laws applicable thereto, the management and regulation of the public streets, and of the use of them for the trusts and purposes of the dedication or establishment of them, and always have been, and now are, in the constant habit of exercising those powers over them, and in reference to them. They prescribe the width of the side walks and of the carriage way, license the partial and temporary use of parts of them for necessary private purposes; permit or prohibit special uses for particular objects, and direct the mode and manner of pitching and paving them, and the laying and leading of sewers and pipes in and through the same, under the surface thereof, for various purposes of public or private use, and constructing and building vaults under the same for public use, and granting to others the right and privilege of building or constructing vaults under the surface thereof, for private uses, for and upon adequate consideration paid to, and received by, them therefor. It may not be out of place here to observe, that it would seem to be necessary, or highly expedient, that for those purposes the legal title to the land or soil should reside in the city corporation, and that it has hitherto been the received opinion that the same was vested in them. Under the colonial government, and during its continuance, the lands occupied by the streets previously laid out, were understood and supposed to be vested in the crown, subject to the use of them as streets; and the state succeeding the crown, in the ownership thereof, the same, and the right, title and interest of the people therein, were, by an act of the legislature passed many years ago, vested in the corporation of the city. The act of 1813, pursuing the

Drake v. The Hudson River Railroad Co.

same policy, provided and declared that the lands taken for the opening of the streets, avenues and squares, laid out by the commissioners for laying out the city into streets and avenues, and all the lands required and taken for forming and opening streets, avenues, squares and places in the parts of the city not laid out by the said commissioners into streets, avenues and squares, should, when taken for any of the said purposes, be vested in the said mayor, aldermen and commonalty of the said city, who should become seised of the same in fee, in trust for the uses and purposes of public streets, avenues and squares, and that the persons benefited thereby, to whom the sums paid therefor, should be assessed and be by them paid, should have no other right, title or interest therein, than the right to use the same as streets and avenues in common with their fellow citizens and the public at large, and the special accommodation and convenience which they acquired from their contiguity thereto. It would seem somewhat strange that lands ceded, or otherwise dedicated to and for public uses as streets, should take a different direction, and the title thereto, if it passed out of the original owners, become vested in the purchasers of the lots fronting to and bounded by the same, and not in the corporation of the city. But which ever rule should be applied to such ceded and dedicated lands, whether the title thereto continues in the original proprietors or vests in the owners of the lots fronting to the same, or in the corporation of the city, the trusts of them are the same—they are to be and continue for ever public streets and avenues for the convenience and accommodation of the owners of tenements and lots bordering upon them, and the use and benefit of the public at large. How then could these plaintiffs, in any aspect of the legal title and ownership of the land subject to these public uses and trusts, be entitled to, or claim compensation for, those lands as belonging to them, and as being required and taken for public uses? The lands forming the streets wherein the tracks of the railroad are laid, have not been taken, and are not required to be taken for the construction of the road; they are used, and the rails laid down upon them for the railroad, by the permission of the corporation

Drake v. The Hudson River Railroad Co.

of the city, to whom the lands, subject to the trust for public uses of them, belong, or at any rate, the right and duty of regulating them appertains. They still continue streets, for the use, benefit and accommodation of the plaintiffs, and their fellow citizens, and the public at large. A leading use and purpose of a public street is for travellers and others to pass and repass on and over the same, with horses, carriages and other vehicles, and on foot. All parties must concur in that definition, as applicable to the right of way over the public streets of the city; and does not the railroad, with its cars propelled by the application of steam, or by animal power, come equally within the definition, as the cart, carriage or omnibus drawn by animals? It is a new mode of using the street, but it is still an use of it for passing and repassing through it, with a vehicle for the carriage of passengers and of goods and freights; and the use of the street by cars with passengers is equally in the exercise of the acknowledged right thus to traverse the street with carriages as the use of them by other vehicles for similar purposes. But the plaintiffs controvert the validity of the assent of the corporation to the defendants to lay down the rails and run the trains of cars through those streets; and insist that the operations of the defendants in that respect are unauthorized, and acts of trespass upon the public rights. The act of incorporation, it is said, requires them to obtain the consent of the corporation of the city, and makes that assent a condition precedent, and indispensably necessary to the right to locate their tracks on the public streets, and use the same for the purposes of their railroad; and it is denied that any valid assent of that body has ever been obtained for that purpose. It is conceded that a resolution has been passed by both boards of the common council, and approved by the mayor of the city, purporting to give the assent of the corporation thereto, but the plaintiffs insist that such assent, to be valid and operative, must be given by a law, or by a resolution having the force and effect of a law of the corporation, and that by the amended charter of the city, recently adopted, a majority of all the members elected to each board of the common council must concur in the passage of a

Drake v. The Hudson River Railroad Co.

law, to make it effectual ; and it is admitted that a majority of all the members elected to each board of aldermen did not agree to the passage of this resolution. By the 4th section of the act entitled an act to amend the charter of the city of New-York, passed April 2d, 1849, it is, among other things, enacted that each board may originate, amend, concur in, or reject, any law, ordinance, or resolution, but no *law* shall pass either board except by a majority of the members elected. The resolution giving to the defendants the assent of the corporation to lay the rails and run their cars from West-street through Canal and Hudson streets to Chambers-street, did not pass the board of aldermen by a majority of the members elected ; the number of members elected being eighteen, and the resolution passing by a vote of eight members in the affirmative, against five in the negative.

If, then, this amended charter was in operation at the time the vote was taken on this resolution ; and that resolution was a law within the meaning of that provision of the act, and if the assent of the corporation to the location of the railroad in a public street, must, to be effectual, be by a law of the corporation, then as the assent of the corporation was not given to the defendants to locate their railroad in a public street of the city, the location of the same in Canal and Hudson-street, was unauthorized, and without the assent of that body. But to this the defendants' counsel reply ; first, that the legislative powers, under the amended charter, do not commence, and are not to go into operation until January next, and that the assent now given is to be by the corporation as it existed before and at the time the amendatory act was passed. And secondly, that the resolution giving the assent was not a legislative act or law requiring a majority of the members elected, to pass it. I do not stop to examine these antagonistical allegations and claims ; or to inquire whether the provisions of the old or the new charter apply to the case ; or whether, by the true construction of the new charter, a resolution is identical with a by-law, and requires the same formalities and sanction to make it effectual. A by-law is a rule or law of a corporation for its government. It is an act of legislation, and the solemnities and sanction required by

Drake *v.* The Hudson River Railroad Co.

the charter for its passage must be observed. A by-law may be in the form of a resolution, and require the same solemnities to pass it; but a resolution is not necessarily a by-law. It may be the mere assent of the corporation to an act of a private citizen, operating upon its property or affecting its corporate rights or franchises, or a license to a citizen to use property or to exercise a privilege. Why not to the use or exercise within its limits, of rights, powers or privileges conferred upon a party by the legislature on condition of obtaining such assent of the city government? Can such assents be in any just sense of the expression termed or deemed laws or acts of legislation of equivalent character? A corporate body, whether specially vested with the power of legislation or not, has inherently the power to make necessary rules for its government and operations, and the right to assent to rightful, and ratify or confirm unauthorized acts of others affecting its interests, whether favorably or unfavorably. That consent may be manifested by some act of the body corporate, or by its acquiescence in the acts of others. A joint resolution, simply embodying and expressing the consent to be given, would seem well adapted to the purpose, and a formal by-law not to be necessary.

But if a by-law was necessary, or if we assume the resolution before us to be, within the meaning of the city charter, an ordinance or by-law, and to be ineffectual and inoperative for want of the assent of the corporation thereto, by reason of the failure in the board of aldermen of a majority of all the members elected, to pass it, what consequences ensue? The railroad company in such case will have located their railroad, and laid down their rails in Canal and Hudson streets, without the assent of the city corporation thereto. Who have they injured, and whose rights have they violated, by their unauthorized acts? Who has a right to complain of the proceeding, and to require the offenders to desist and remove the rails? I assume that the soil of the streets is vested in and belongs to the corporation of the city, subject to a trust for the public use of them as public streets of the city, or that to them alone appertains the exclusive right of the charge and regulation of the same. The plaintiffs, then,

Drake v. The Hudson River Railroad Co.

can not complain of the defendants, and treat them as trespassers upon the lands or premises, nor require that compensation should be made to them for the lands within and forming part of those streets.

The corporation of the city, as the owners of the legal title to the soil of the streets, if they be so, are the parties alone whose rights of property are violated, or whose ownership may be said to be usurped, and who may claim the right to have the rails removed, or the use of the street vindicated and freed from the alledged incumbrance, or the proceedings of the company arrested until compensation shall be made for the grounds they occupy. The city corporation impute no wrong to the railroad company in their locating their railroad in those streets, and take no steps for the removal of the rails as having been laid down without authority. They acquiesce in the acts of the company, and tacitly give their assent to the operation.

But the plaintiffs say that the tenements and lots fronting to the streets, and in the vicinity of them, are injuriously affected by the railroad, and claim that they were entitled to a just and adequate compensation for the loss and damage they thus sustained thereby, before the defendants could have had the right, or can be allowed by law to lay down or continue the tracks of rails in those streets; and they insist that the said tracks of rails ought on that ground to be removed, and the continuance of them prohibited by the order or injunction of this court until such compensation shall be made.

By the act of 1848, further to amend the act to authorize the construction of a railroad from New-York to Albany, the Hudson River Railroad Company is authorized to enter upon, take, and use all such lands, real estate and property, as may be necessary for the construction and maintenance of the said railroad, and the convenient accommodations appertaining thereto, but compensation to be made for the land, real estate, and property thus taken and used, and not voluntarily given to nor purchased by the company in the manner therein directed; and the act then provides, that whenever the said corporation shall not have acquired, by gift or purchase, any land, real estate or

Drake v. The Hudson River Railroad Co.

property, so required as aforesaid, or which may be affected by any operation connected with such construction and maintenance, the same may be taken and acquired by them, and the compensation to be made to the owners and parties interested, ascertained and certified in the manner and by the process therein prescribed. Now these provisions, it will be observed, are calculated and intended for enabling the defendants in cases where the lands, real estate or property required for the railroad, can not be obtained by gift or purchase, but must be taken adversely to the owners, or without their consent, to have the damages and compensation assessed and ad-measured, which they are required and bound to pay and make to the owners and parties interested, for the lands, real estate and property so to be taken for the construction of their railroad, under and in virtue of the right of eminent domain residing in the sovereignty of the state. They are inapplicable to cases of mere consequential damages by the railroad constructed and made on land belonging to the railroad company, or which they are permitted and allowed, by the owners and proprietors of them, to use for the location of the railroad, and the laying down of the rails thereon, to the lands and premises of other persons to which no direct injury or damage is done thereby, or by any operation connected therewith. When lands are required for the location and construction of the railroad, which can not be obtained by purchase, and must be taken without the consent or against the will of the proprietor, the principle and rule of necessity which the right of eminent domain alone can justify, must be applied, and the amount of compensation must be ascertained and certified, and must be paid to the parties entitled thereto, or deposited in bank for them, under the authority of the act and the approval of the court, before the land can be taken or used, or any entry, other than for surveys and examinations thereof, can be made thereon; and in such cases the defendants are authorized and allowed, and it is a benefit to them, to have the compensation ascertained which they are to make, as well for the lands required to be taken, as also for the damages to other lands by the operation connected with the rail-

Drake v. The Hudson River Railroad Co.

road ; to the end that they may, on payment of the sums assessed thereupon, be discharged from all claim for or on account thereof. But when the railroad company own the lands on which they locate their railroad, or have the license and permission of the proprietors thereof to locate the road thereon, they have a full and perfect right to use the same for that purpose, in the same manner and to the same extent that they might rightfully use them for any purpose, and to lay down the track of rails and run their trains of cars over the same by right of the title and ownership of the land or license to occupy and use it, and they are under no restraint or control of others in their use thereof, and bound only to the observance of the benign and salutary rule and injunction of law so to use their own as not to injure the property or premises of others, or to injuriously affect them as regards their property, personal safety, health, or business pursuits. But it is contended that the acts authorizing this railroad, contemplate and require that compensation be in all cases made to the owners and parties interested in any land or property which may be injuriously affected by any operation connected with the said railroad, for the damages thereby to such lands and premises so affected. And that such damages are to be ascertained by appraisement, and to be paid to the parties entitled thereto, before the railroad can rightfully be constructed, or the rails laid on the line or route selected and designated for the same. That the plaintiffs are entitled to compensation for any loss or damage they may sustain from the railroad, or any of the operations connected therewith, is not denied. And whenever, and as often as any such loss or damage may arise or accrue from any such cause, the plaintiffs, or such of them as may sustain the same, will have their remedy therefor by action at law against the defendants. The right and privilege granted to them by the legislature to construct their railroad on such line or route as they may select, and to lay down rails and run trains of cars thereon, will not protect them from the claim of those whom they may wrongfully injure or aggrieve by their operations, for redress, nor be any defence to actions against them for damages from any such

Drake *v.* The Hudson River Railroad Co.

cause, by the parties aggrieved. But the plaintiffs insist that they are not bound to wait until the loss or injury the railroad, or any operation connected therewith, is to inflict upon them, is actually incurred, but that the same is so certain to happen, and will necessarily, if permitted, be so permanent and disastrous to them, and has already been so sensibly, though as yet but partially felt, that they are entitled to the preventive remedy of an order or injunction of this court interdicting the same and the further continuance thereof. We will not say that direct and immediate injuries by this railroad, or any operation connected therewith, though located, by consent, in a public street of the city, to buildings or lands contiguous or near to the railroad track, if such injuries be irreparable or permanent, would not be within the scope of the provisions of the act, and the defendants be required to make previous compensation for the same. Nor will we say that they might not be restrained from any operation connected with their said railroad, injuriously affecting any such buildings or lands, or from the continuance thereof, until such compensation had been first ascertained and made, under and in pursuance of the provisions of the act for the ascertainment of compensation to parties interested for injuriously affecting their lands and property; and that such would be the regular course in such cases may perhaps be by a liberal construction, inferred from the provisions of the act. But it would not follow, from such construction, that contingent future damages, or indirect and consequential injuries of indefinite amount, not capable of estimate, would come within the rule, and there are many and weighty reasons against extending it to them. Now, are not the injuries of which the plaintiffs complain, of that character? They complain that the use and benefit of the streets, to them, will be impaired by the partial occupation of those streets by the railroad tracks; that the value of the tenements and lots fronting thereon, for business operations, is diminished by the alledged impediment of the rails to the crossing of the streets, and the obstruction thereby of the free passage on and along the same with carriages and by foot passengers; and they suggest also, and complain of the probable desertion of their stores and

Drake v. The Hudson River Railroad Co.

shops by their customers, by reason of the difficulties and danger of access to them ; and in addition thereto, they anticipate and complain of the inconvenience and annoyance to themselves and their families and friends from the perpetual running of the cars and other operations of the railroad. Numerous affidavits are introduced by the plaintiffs to sustain these charges, and they are met by affidavits on the part of the defendants repelling them, and representing the railroad not only as free from objections, but as being a valuable improvement, useful and desirable to the city and the citizens. Upon these conflicting affidavits we are asked to form our conclusions upon the questions of fact involved in the controversy, whether the railroad, in its occupancy of a portion of the centre of the two streets, and in its operation, is liable to the objections preferred against it, as productive of the evils to those within its immediate influence which are ascribed to it, or is unjustly subjected to these injurious charges. The utility of the railroad as a great public improvement, and a vast convenience and accommodation to the city and the public at large, admits of no question ; but these considerations can not authorize or justify its encroachment upon the rights of any portion of our citizens. The interests of the individual whose property may be injuriously affected, must not be sacrificed to the success of the improvement because it is desirable and of value to the public ; but he is to be indemnified and fully compensated for his loss or damage thereby, by the public, or by the company, which profits by the improvement. And the questions are, what evils these plaintiffs do endure, and what damage they sustain by this railroad, and in what manner these evils are to be remedied or alleviated, and just compensation made for the damages which they may sustain.

The plaintiffs have a right to the full and free use of the street on which their tenements front, for access to their dwellings, and for the convenience and accommodation of their residences and business pursuits ; but they can claim no greater right or interest in the streets than such full use and benefit of them as public streets. All other citizens have an equal right

Drake v. The Hudson River Railroad Co.

with them to such use thereof, as public streets, and the railroad company, as part of that public, have the same right in common with others, to use the same, under the rules and regulations prescribed to them by the proper authority in the premises, for the purposes to which the lands forming the streets were dedicated to the public, or taken by the corporation for public purposes. The tracks of the railroad are laid thereon, for enabling their cars to pass and repass on and along the same, for the carriage of passengers and the transportation of goods and freights, and such is the acknowledged use and purpose of all public roads or highways. It is a new mode of using the public street or way, but it is nevertheless, a mode of using it. We agree that the lands forming the streets were dedicated to the public, or vested in the corporation of the city as and for public streets, to pass and repass over the same with horses, carriages, and vehicles of every description, as well as on foot, and as well for the use of those occupying tenements fronting to the same for access to their dwellings and tenements, and the accommodation of their business operations, as also for the common use of all others having occasion to use the same as public streets or highways. But we can not agree that the plaintiffs, or those from whom they derive their title to their lots, acquired or possess any special right to, or interest in the said streets, or the lands forming the same, beyond, or in exclusion of other citizens, except only that from the circumstance of their tenements and lots fronting upon the streets, they participate more largely of the use of them, and receive greater benefit and advantage therefrom than other citizens whose tenements or lots do not front thereon. Nor can we agree that the dedication of those streets to public uses, or the acquisition of them by, and the vesting of the legal title to them in the corporation of the city, was upon any trust or purpose that the use and mode and manner of using them should for ever be and remain such as the same then were, or in the language of the complaint, "in the usual and accustomed manner of using and passing upon public streets in cities, in use at the time of such dedication or acquisition of them, as and for public streets;" but our conclusion is, that the same

Drake v. The Hudson River Railroad Co.

were so dedicated to public uses, and so vested in the said corporation upon trust that the same should be kept open as public streets for the use of the citizens of the said city of New-York, for ever, in the manner in which streets then were, or should at any time thereafter be beneficially used by lawful authority, for the purposes of public city streets. The regulation of the streets we understand to be vested in the common council of the city, and that the manner and mode of using the same for the purpose and conformably to the trusts of the same, is to be prescribed and directed by them. That power, rightly exercised, while it keeps the streets open to the use of all carriages and vehicles accustomed to use them, will allow any new species of carriage or vehicle, or improved mode of conveyance of greater convenience and speed to participate in the use of the same, and the street, or a suitable portion of it, to be adapted, as far as the legitimate purposes thereof as a street will permit, to such new mode of using it—not that important changes should be lightly made, but new and improved modes of use may, and in the discreet and prudent exercise of the power, always will be adopted and applied, whenever the public interest may require it, and the same can be done consistently with the trust of the street for the public use of the citizens, and without encumbering the streets to the prejudice of other citizens, or precluding them from any rightful use thereof, or injuriously impairing such use thereof by them. Railroads are of recent introduction, but their great and acknowledged advantages over all other modes of travel and land carriage, have gained for them a popularity which have brought them into extensive use, and are constantly yet further extending their adoption. The actual existence of them in other cities, and the example of the Harlem Railroad in our own city, which has now been in successful operation for several years under our own eyes, conclusively show that the use of them in the streets of a city, if properly guarded and regulated, is compatible with the trusts of public streets, and the simultaneous use of those streets by other carriages and vehicles, and for all the purposes to which public streets are dedicated. And the corporation, with a prudential care and regard to the

Drake v. The Hudson River Railroad Co.

rights and interests of the citizens, have passed an ordinance for the government and regulation of this railroad in the use of the streets wherein they are permitted to locate the same, to which the company are bound, and may be compelled, to conform. To the corporation application for relief against abuses of the privileges the defendants enjoy, may at all times be made, and by that body all existing grievances, or future grievances, or grounds of complaint, capable of remedy or redress, may, and we trust always will, receive early attention, and the proper remedies be promptly applied.

But the plaintiffs alledge and complain that obstructions are created by and consequent upon the permanent location of the Hudson River Railroad in the streets whereon their tenements front, and the appropriation of parts thereof for the tracks of rails laid or intended to be laid thereon, which will exclude, or so unreasonably circumscribe, the use thereof by them, the plaintiffs, in the usual manner, as to constitute a direct invasion of their rights as owners of said lots, and to be wholly inconsistent with the objects of the original dedication of those portions of the said streets to public uses, and they insist that such appropriation of said parts of the streets to the use of the defendants, is a purpresture, and the rails so laid, and the use made thereof by the defendants, are, and will be, a nuisance. If these representations are correct, the charges founded upon them would be just, and the plaintiffs entitled to redress, for the rules of law do not tolerate either purpresture or nuisance in or upon a public street or highway. But do these tracks of rails create or cause a purpresture on any part of these streets ? or is the use of them by the cars running upon them, in any just sense of the term, a nuisance ? A purpresture is the encroachment by any person, by building or otherwise, on a street or some part of it, or such an enclosure, impediment or obstruction of it thereby, as to amount to the exclusion and hindrance of the citizens and the public from the full and beneficial use and enjoyment of it as a public street. There is no charge against the defendants of any encroachments by actual enclosure of any part of either of these streets for the uses or purposes of the railroad ; but they alledge

Drake v. The Hudson River Railroad Co.

that heavy iron rails are intended to be laid, and are in part laid upon and along the centre of Canal-street, from West to Hudson-street, and upon and along the centre of Hudson-street, from Canal to Chambers-street, for the double track of said railroad, enclosing within the rails so laid 16 feet in width of the middle of said streets; but which allegation they qualify and explain, to mean that the heavy iron rails are designed and intended by the defendants permanently to remain upon and occupy and encumber said portion of said streets, and to be used by the defendants only, and not by the owners of lots fronting to the streets, or by the public; and they further alledge, that the defendants intend to use, upon each of the said tracks, cars and carriages propelled by steam or otherwise, of the width of about nine feet each, and in great numbers, so that from the width of the cars and carriages, and the length and number thereof, the manner of using the rails, will partially exclude the owners of lots fronting upon the streets, and the public, from the beneficial use and enjoyment of the same for the purposes of a public highway or street, or for the individual trade or commerce of the occupants of the lots fronting thereon. And it is further stated in the complaint, or the affidavits accompanying the same, that the species of rails the defendants use, and intend to use, is a very heavy bar, not even with the surface of the street, and not the flat bar, on a level with the surface. And that the dangers and difficulties of crossing such rails with carriages and other vehicles, and the insufficiency of the spaces on each side of said tracks, alledged to be too narrow for carriages to pass each other therein, are such, that if the running of the cars and carriages of the defendants on their said tracks should not amount to a constant and uninterrupted use thereof, and to an entire exclusion of others therefrom, it will most unreasonably circumscribe them, the plaintiffs, in the use of said streets, to their great and manifest prejudice, and in violation of their just rights as such owners of lots, in and to the full beneficial use of said streets. To these points the affidavits of the witnesses on the part of the plaintiffs chiefly apply. Those witnesses testify to their opinions adversely to the railroad, as being an encroach-

Drake v. The Hudson River Railroad Co.

ment upon the rights of the plaintiffs, and of other citizens—an inconvenience to them in the use of the streets, and an hindrance or annoyance to those whose lots front said streets, in their business occupation and pursuits, by deterring customers from frequenting their shops and stores, or impeding the access and approach thereto. Some of them express fears of danger from the cars, and refer to accidents they state to have happened: and many of them speak of the apprehended decline of business and rents in consequence of the presence of the rails in the street, and the obstructions and annoyances they occasion to passengers; and those injurious or unfriendly effects of the rails upon the streets, and those who have occasion to use them, they chiefly ascribe to the difficulty and danger of crossing the track with carriages, and the insufficiency of the space on each side of the track for carriages for passing and repassing in and along the same, supposed by them to render the streets impassable, or nearly so, by other carriages at the same time with the running of the cars upon the track, which they anticipate to be in almost constant motion on the track, and thereby occupying it almost exclusively. That rails illy laid in narrow streets may occasion many of these inconveniences is not denied, but in streets of the width of Canal and Hudson streets, they probably will not exist, or be but partially felt. Canal-street is 100 feet in width, and Hudson-street, in some places, 85, and in others 90. None of the objections peculiar to tracks in narrow streets can be applicable therefore to the railroad in question; and if some inconveniences and annoyances nevertheless attach to it, they are believed not to be of sufficient magnitude to call for the aid of this court to enjoin its operation, and direct the removal of its rails, especially upon *ex parte* affidavits in the present stage of the controversy. Not that the complaints of individuals are to be disregarded, or the interests of any class or portion of citizens sacrificed to improvement, trenching on their rights, for the use or benefit of the community. Private rights are at all times and under all circumstances to be respected, and as far as practicable protected; and if private property of any description is at any time required for public use, or im-

Drake v. The Hudson River Railroad Co.

provements in which the public is interested, the public at large, or those specially benefited by the improvement, are to make full and ample compensation to those who suffer or are injured thereby, for the loss and damage they sustain. This rule is of universal application: it is engrafted in the constitution of the state, and its observance is obligatory upon the legislature who enact laws, and on the courts which expound and administer them. But in acting upon it, and carrying out the principle, while lands and real estate are not to be taken for public improvements, nor injuriously affected by them, nor vested rights of fixed and determinate value, susceptible of estimate and ascertainment, divested or injuriously invaded, without just and adequate compensation first made to the owners and parties interested therefor; yet desirable improvements of public utility, and beneficial inventions of general interest, are not to be rejected, suppressed or arrested, simply because they may in their operation and practical effect occasion to property in their vicinity or within the sphere of their action, some contingent or consequential damage. For these, when they occur, the party aggrieved has a remedy by action at law, and by a repetition of such action, during the continuance of the grievance, whenever and as often as loss or damages ensue, and with the ulterior remedy which in case the presence of the tracks in the streets, or the running of the cars upon them, or other operations of the railroad, should be or become a nuisance, or the aggression shall prove to be permanent and without an adequate remedy by action, this court will be competent to administer its equitable relief by injunction to prevent its continuance, or for its removal; but a much stronger case must be presented, and the impending danger more imminent and more impressive than this complaint, and these affidavits, show, to justify us in the application of these severe and coercive measures as precautionary and preventive remedies.

EDWARDS, J. The first ground upon which the plaintiffs claim to be entitled to the interposition of the court is, that the state had not the legal power to delegate to the defendants, the

Drake v. The Hudson River Railroad Co.

right to take and use the property of individuals, in the construction of a railroad.

In the case of *Bloodgood v. The Mohawk and Hudson Railroad Company*, (18 Wend. 9,) this question was elaborately considered, and it was held, not only by all the members of the court for the correction of errors, who delivered opinions, but it was also expressed in the form of a resolution, which embodied the opinions of a large majority of the court, that the state had the constitutional power to authorize the taking of private property for the purpose of making railroads and other public improvements of a like nature, on paying the owner of such property a full compensation therefor, whether such improvements were made by itself, or through the medium of a corporation or joint stock company.

That the state, in the exercise of the right of *eminent domain*, has the power to appropriate the property of individuals, for the safety or manifest advantage of the public, upon making just compensation, was never denied. It is an inherent attribute of sovereignty. And, if the state itself can do so, by its direct and immediate action, it would seem that it must necessarily follow that it can do so through the instrumentality of others, whether corporations or individuals. But the delegation of this right must be accompanied with such restrictions as will protect the rights of those whose property may be taken.

It was said, however, upon the argument, that the decision in the case of *Bloodgood v. The Mohawk and Hudson Railroad Company*, although made by the highest court then known in this state, was not binding upon us as authority, because the question which was there decided did not necessarily arise upon the pleadings before the court. In this I disagree with the counsel. It appears, by reference to the report of the case, that the question as to the constitutional power of the legislature to authorize the taking of private property for the use of a railroad, upon making just compensation to the owner of the property taken, was considered both by the counsel who argued the cause, and the court which decided it, as the principal question for adjudication. It was clearly raised by the demurrer of

Drake v. The Hudson River Railroad Co.

the plaintiff to the defendants' plea. The plaintiff declared in trespass *quare clausum fregit*. The defendants pleaded that they entered the plaintiff's close for the purpose of constructing their railroad, as they lawfully might do. The demurrer to this plea, of course, made it an issue, and the only issue, whether the defendants were legally authorized to do the act complained of; that is, whether, in the first place, the state had conferred upon them the authority which they claimed the right to exercise; and, in the next place, whether it had the constitutional power to confer such authority.

The next ground taken by the counsel for the plaintiffs was, that the defendants had no right to appropriate private property for the use of the railroad, without first making compensation therefor; or, in other words, that the right of the owners of property to compensation was a condition precedent to the right of the company to take their property. In the case of *Bloodgood v. The Mohawk and Hudson Railroad Company*, above cited, this question was also fully and thoroughly examined and considered, and a provision for compensation, similar to the one contained in the charter under which the defendants in this suit were incorporated, was considered a condition precedent. It is true that in that case the clause of the charter which required the compensation to be made, was expressed in the form of a proviso. But it was not upon that ground that the court founded its decision. It was upon the higher ground, that, unless the provision should be regarded as a condition precedent, the act would be unconstitutional.

The question then arises, whether any property owned by the plaintiffs has been taken and appropriated by the defendants to the use of their railroad without just compensation having first been made.

By reference to the complaint, it appears that previous to the year 1797, the corporation, known as the Rector and Inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the state of New-York, were owners in fee simple of a large tract of land, on parts of which portions of the street, now known as Hudson-street, were laid out, and

Drake *v.* The Hudson River Railroad Co.

that such portions of the land as were laid out into a street were dedicated to the public as such. It also appears that afterwards, and on the 20th June, 1797, they conveyed a part of the land thus laid out into streets to the mayor, aldermen and commonalty of the city of New-York, in trust that the same should be kept open for the use of the citizens of said city for ever. And afterwards, on the first day of December, 1813, they made a similar conveyance of the remaining portions of the land laid out into a street as above stated.

It is contended, on the part of the plaintiffs, that when the Rector and inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the state of New-York, conveyed or leased the lots bounded upon those portions of the land which had been dedicated as a street, they also conveyed or leased the land dedicated for a street opposite to such lots, *ad medium filum viæ*, subject only to the public easement; (*see Hammond v. McLachlan*, 1 *Sand. Rep.* 323; *Child v. Starr*, 4 *Hill*, 369;) and that, according to the rule laid down in the case of *The Trustees of the Presbyterian Society in Waterloo v. The Auburn and Rochester Railroad Company*, (3 *Hill*, 569,) inasmuch as the right of the defendants to the use of the street for a railroad track was an easement peculiar to themselves, the owners of the fee in the street were entitled to compensation; and that before such compensation was ascertained and paid, the defendants had no right to use the street for a railroad track.

It appears from the complaint, that the property of all the plaintiffs whose lots lie contiguous to Hudson-street, with the exception of Susannah Drake, consists of leasehold estates which commenced in the year 1849. These persons, then, have clearly no claim for compensation; for the fee of the street had been conveyed to the corporation of the city of New-York long before any interest had been conveyed to them.

As regards the lot owned by Susannah Drake, it does not appear from the complaint when her title to it was acquired. It appears, however, from the deed of conveyance under which she now holds, and which was exhibited on the argument, that

Drake v. The Hudson River Railroad Co.

her title did not accrue till the 30th of December, 1823, which is also long subsequent to the date of the conveyances executed to the corporation of the city of New-York. But it is said that she formerly held under a lease which had been executed previous to the time when the land opposite to her lot was conveyed to the city. It seems from the abstract which has been furnished to us, that on the twentieth day of January, 1804, a lease of the lot now owned by Mrs. Drake was executed to Adam Tredwell and Stephen Thorn for the term of ninety-nine years from the 25th March, 1804, and that after a number of mesne assignments, it was assigned to herself, and three other persons, on the 27th of December, 1820. Whether the lease was cancelled at the time when the deed of conveyance was executed to Mrs. Drake does not appear. But, as between herself and the corporation, known as the Rector and Inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the State of New-York, the relation of landlord and tenant, of lessor and lessee, must have ceased. She could no longer hold under the lease. The title which she then acquired was founded on the conveyance, and commenced at the time of its execution. That conveyance could embrace no other property than that which the grantees had the right to convey at that time, which must exclude the fee in the street, which had been previously conveyed to the city of New-York.

But it is contended that although the property of the plaintiffs has not been taken for the purposes of the railroad, yet that it has been injuriously affected, and that the defendants have no right to lay a railroad track, which shall injuriously affect the property of any person, without first making compensation for the injury. Admitting that the property of the plaintiffs has been injuriously affected, still there is no constitutional provision which can restrain the defendants from making their road until compensation is made to the parties injured; neither does the charter of the company require that such compensation be made, as a condition precedent to the right to make the railroad. The company has the right, in order to protect itself against future litigation, to apply for the appointment of commissioners

Drake v. The Hudson River Railroad Co.

to ascertain what compensation shall be made. If it does not choose to do so, it will subject itself to a suit on the part of those who are injured; or in case of irreparable injury which is incapable of being compensated in damages, this court will be bound to interfere by injunction. The complaint, and affidavits annexed to it, do not set forth a case of irreparable injury. On the contrary, it seems to me that they do not show a case in which the company would be bound to make compensation.

Whatever the rule of compensation should be for injuriously affecting the property of any person, it ought not, according to any sound principle of law, to extend beyond the rule of damages which would be adopted in an action against the company; that is, the damage which is the natural and proximate consequence of the act complained of. The affidavits do not set forth any facts from which we can infer certain and inevitable damage. They state circumstances from which we can infer inconvenience to the plaintiffs, but not inconvenience amounting to that species of injury which the law will take notice of.

The next question to be considered is, whether the use of Hudson-street by the defendants, for a railroad track, is such an exclusive appropriation of the street as amounts to a nuisance. It appears from the complaint that subsequently to the conveyance by the Rector and Inhabitants of the city of New-York, in communion of the Protestant Episcopal Church in the state of New-York, to the corporation of the city of New-York, of that tract of land which now constitutes a portion of Hudson-street, and in pursuance of the act of 1813, and for the purpose of carrying out the object for which the land was conveyed, the same was opened and laid out as a public street. It follows, then, that not only the plaintiffs in this suit, but the public generally, have the right of free and unobstructed passage and repassage over the street as a public highway. And if its use for a railroad track deprives them of such right, they are entitled to the relief sought in this suit.

It has been held both in this state, and in other states of the Union, that a railroad is not *per se* a nuisance. (*Hamilton v. The New-York and Harlem Railroad Company*, 9 *Paige*,

Drake v. The Hudson River Railroad Co.

171. *Lexington and Ohio Railroad Company v. Applegate, 8 Dana, 289.*) The use of a street for a railroad consists merely in adapting its surface to a particular mode of conveyance; and when so adapted the running of a railroad car is no more an exclusive appropriation of the street, than the running of any other species of conveyance would be. If the additional facilities for passage and repassage which a railroad furnishes, will have the effect of increasing the use of the street, and thus cause some inconvenience to persons doing business, or residing in its neighborhood, yet if it is not diverted from the purposes for which it was opened and laid out, no right of any person will be violated. Neither will there by any infringement of private rights if the track itself should cause a slight change in the surface of the street, provided the passage is free and unobstructed. The affidavits on the part of the plaintiffs, it is true, contain the opinions of many respectable citizens, that the value of property adjoining Hudson-street will be materially diminished by its use for a railroad. On the other hand, the affidavits on the part of the defendants contain the opinions of citizens of equal respectability, that no such consequences will follow. But it does not appear from any of the affidavits submitted on the part of the plaintiffs, that the right of passage and repassage will be obstructed or abridged. The most that they state is that the street will be rendered less convenient for the ordinary purposes of a highway.

The next question which was raised upon the argument is, whether the corporation of the city of New-York have assented to the use of Hudson-street for the purposes of a railroad. By the charter under which the defendants were incorporated, it is provided that "the directors of the company may locate their railroad on any of the streets or avenues of the city, westerly of and including the Eighth avenue, and on or westerly of Hudson-street, provided the assent of the corporation of such city be first obtained for such location. (*Laws of 1846*, p. 274.) It appears from the complaint, that a resolution passed both boards of the common council, and was signed by the mayor, authorizing the defendants to lay a double track of rails through Hud-

Drake v. The Hudson River Railroad Co.

son-street, subject to certain specified regulations. It also appears that such resolution passed the board of aldermen by a vote of eight members, which is less than a majority of the whole members elected. By the amended charter of the city of New-York, passed April 2, 1849, it is provided that no law shall pass either board, except by a majority of the members elected. Two questions were raised upon the argument. First, whether this provision of the amended charter goes into effect before the 1st of January, 1850; and second, whether an *assent* on the part of the corporation comes within the definition of a *law*. With the view that I have taken of this branch of the case, I do not consider it necessary to decide either of these questions.

It will be observed that, as far as the right of the defendants to lay a railroad track upon certain streets in the city of New-York is concerned, the legislature have not delegated to them the exercise of the right of eminent domain. In respect to the right to use the streets of the city, the legislature have not assumed to interfere with the controlling power with which the corporation of the city is invested, for the regulation of its public streets and highways.

The corporation of the city, as the legislative body having the power, and whose duty it is, to regulate streets for the public benefit, unquestionably has the power to assent to the use of Hudson-street for the purposes of a railroad, provided no private rights are violated—and it also has the power to refuse such use. But if it neither assents, nor refuses, and no private rights are violated, this court would not be authorized to interfere upon the application of a private individual, and prevent what the corporation of the city, which alone has a right to act in the matter, does not object to. Whether the assent of the corporation has been given in the legal form or not, it is sufficient, as far as this suit is concerned, that it has not dissented, and that none of the private rights of the plaintiffs will be violated.

With these views I am of opinion that the motion for an injunction should be denied.

Drake *v.* The Hudson River Railroad Co.

EDMONDS, J. If the injuries to the plaintiffs' property, enumerated in the affidavits, are real, and not merely imaginary, I see no difficulty in the way of a court of law's affording compensation for them in a proper suit brought for that purpose. It may very well be that they may not be the subject of assessment and appraisement in advance, and can only be properly ascertained afterwards, as experience may demonstrate them, and define their exact character and extent. But that is not, in my opinion, any reason against the defendants' proceeding in their erections. The prohibition of the constitution is against taking private property without compensation, and not against injuries to such property, where it is not taken. In this case, the private property of the plaintiffs is not taken by the defendants; but the whole allegation is, that it is injured by erections in its vicinity; and the plaintiffs have not, therefore, any claim to have their damages ascertained and paid for before such erections shall be constructed or used.

The case then presents itself to us in this form—that the defendants are injuring the property of the plaintiffs, bounded on a street, by erections in the street, and the demand is, that we enjoin them from doing this injury. Now, in such case, it seems to me that the law is well settled that an injunction can not go. In the case of *Hart v. Mayor of Albany*, (9 Wend. 580,) our court for the correction of errors examined the doctrine very much at large, and laid down what I understand to be the settled doctrine, that an injunction will not go, except in cases of great and irremediable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed. There is no injury complained of in this case, which can not be compensated in damages.

There is, however, another ground on which an injunction in such cases may be granted, namely, to prevent the multiplicity of suits; and it might be in this case, that the parties might be subjected to many suits before they should receive full compensation. But this difficulty is obviated by the statutes incorporating the defendants, and amending its act of incorporation.

Bander *v.* Bander.

All the damages which the plaintiffs may sustain from the defendants' erections may be ascertained at once, by the appointment of commissioners of appraisement. And I understand the provision of those statutes authorizing an assessment of damages to land which may be affected by any operation connected with the road, to be intended purposely to meet this difficulty, and to enable the defendants by one act, and at one time, *uno fato*, to make all this compensation, and not merely to enable them to do the act, which may injuriously affect lands not taken. There need then be no multiplicity of suits; for all the damages can be ascertained and settled in one proceeding, as to any land which may be injuriously affected by any operation connected with the road.

Thus, both the grounds on which alone is founded the practice of granting an injunction in such a case, are wanting in this suit. And this motion must be denied.

Motion denied.

MONTGOMERY SPECIAL TERM, December, 1849. *Paige, J.*

BANDER *vs.* BANDER.

Upon a promissory note in these words: "For value received I promise to pay M. B. or bearer the sum of \$1000, payable in ten annual installments, with use, the first payment to become due on the first day of June, 1848," interest is payable on the several installments as they respectively become due, and not annually on the whole principal sum remaining unpaid.

There is no general principle of law which requires the interest on notes, bonds, or other written contracts for the payment of money, to be paid annually. The time at which it is to be paid must depend upon the agreement of the parties, as expressed in the contract.

THIS was an action upon a promissory note in these words: "For value received I promise to pay M. Bander or bearer the

Bander v. Bander.

sum of \$1000 payable in ten annual installments, with use, the first payment to become due on the first day of June, 1848.

March 6, 1847.

DANIEL BANDER."

The cause was tried, by the court, without a jury. The only question was as to the amount of interest due upon the note.

G. Yost & D. G. Lobdell, for the plaintiff.

L. Ford, for the defendant.

PAIGE J. The only question presented for decision, in this case, is, whether by the terms of the note on which the suit is brought, interest is payable annually on the whole principal sum, or only on the respective installments at the several times when they become due.

A promissory note is, like any other written contract, to be construed in accordance with the intention of the parties, as declared by the express words of the note, or as it is deducible by clear and manifest implication from its terms. The force and effect of the note must be determined by its terms, and not by proof *aliunde*. And when the operation of a statute is clearly settled by the general principles of law, the parties must be deemed to have entered into the contract in reference to such principles. (*Thompson v. Ketchum*, 8 John. 189. 2 Cow. & *Hill's Notes*, 1460.) There is no general principle of law which requires the interest on notes, bonds, or other written contracts for the payment of money, to be paid annually. Whether the interest is to be paid semi-annually, annually, biennially, or at any other times, must depend altogether upon the agreement of the parties as expressed in the contract. Interest is a mere incident or accessory to the principal debt. It is not a part of the debt. And where there is no express contract to pay interest, it can only be recovered as damages for the non-payment of the principal when it becomes due. (*Per Savage, Ch. J.* 13 Wend. 640, 641. *Per Walworth, Chancellor*, 15 Id. 80.) In all cases where there is no express agreement to pay interest, if the creditor accepts the amount agreed to be paid, in full

Bander v. Bander.

satisfaction of the principal, without requiring payment of the interest from the time the principal became due, no action will lie to recover such interest. (*Stevens v. Barringer*, 13 *Wend.* 639. *Fake v. Eddy's Ex'r*, 15 *Id.* 80. *Tillotson v. Preston*, 3 *John.* 229. *Johnston v. Brannan*, 5 *Id.* 268. *Williams v. Houghtaling*, 3 *Cow.* 87.) So where there is no express contract to pay interest, independently of the principal, if the demand for the principal is barred the accessory falls along with it. (*Hollis v. Palmer*, 2 *Bing. N. C.* 713, *per Tindal, C. J.* 3 *Scott*, 265. 2 *Hedges*, 55, *S. C.*) And if a party pays the principal of a debt barred by the statute of limitations, such payment does not revive the claim for interest thereon. (4 *Bing.* 315.) On contracts for the payment of money, which contain no express agreement for the payment of interest, interest is only recoverable from the time when the principal debt falls due. (*Williams v. Sherman*, 7 *Wend.* 109. *Gaylord v. Van Loan*, 15 *Id.* 310. *Chit. on Bills*, 678.) And if the contract contains an agreement for the payment of interest, but is silent as to the time when it is to be paid, the interest is not payable until the principal debt becomes due. This is undeniable, upon principle, and is apparent from the cases. (2 *Mass. Rep.* 568. 3 *Id.* 221. 1 *Bouv. Law Dic.* 700, *tit. Int.* *Blake v. Lawrence*, 4 *Esp.* 148. *Catlin v. Lyman*, 16 *Verm. Rep.* 48.) There is nothing in *Blake v. Lawrence* which countenances the idea that interest upon a note like the one in this case, is payable annually on the whole principal. In that case the note was payable by installments of ten pounds every three months, and in default of payment of any installment the whole was to be payable immediately. Lord Ellenborough held that, as on default of payment of any installment, the whole amount of the note became due, there was no severance as to time, with respect to the debt's becoming payable; and as by the first default the whole became one debt, interest became payable from that time.

In this case the interest is not by the terms of the note made payable on the whole principal sum annually. If the words payable "in ten annual installments" had been omitted, and the

Bander *v.* Bander.

words "ten years," or words expressing any other period of time had been substituted, there would have been no ground for insisting that the interest on the whole principal sum of the note was payable annually. In that case the interest would not have been payable until the principal fell due. If the parties had intended that the interest on the whole of the principal debt should be paid annually, they ought to have expressed such intention by the use of appropriate words. If the parties had inserted after the word "use" the words "on the whole principal sum, to be paid annually," such intention would have been clearly manifested. I think that the words "with use," which convey the same meaning as "with interest," refer to the words "payable in ten annual installments," the last antecedent; and that the true interpretation of the note is, that interest was to be payable on the several installments as they respectively became due, and not annually on the whole principal sum remaining unpaid. If the words "with use" referred to the principal sum, a different construction could not be given to the note, as they are not followed by appropriate words declaring that the interest should be paid annually; or by words from which the intention of the parties that the interest should be so paid, could be clearly inferred. The principle that the interest on a promissory note, payable with interest, is not payable until the principal becomes due, where the note is silent as to the times when the interest is to be paid, must control the construction of the note in this case. The note in question contains no words declaring when the interest should be paid; and as there is no rule of law which require interest to be paid annually, where the parties have omitted to declare when it shall be paid, I must decide that the interest on the note is not payable annually on the whole principal sum; but only on the several installments as they respectively fall due. If this construction is not in conformity with the actual agreement of the parties which was made and intended to be carried into effect when the note was given, the remedy of the plaintiff is by an application to the equitable jurisdiction of the supreme court, to reform the note, so as to make it correspond with the agree-

Tillou v. The Clinton and Essex Mutual Ins. Co.

ment which was actually made in relation to the interest. (15 *Wend.* 82.)

Judgment must be entered in favor of the plaintiff for the amount remaining unpaid of the installments of the note which have already become due, with interest on the same up to this day.

7 564
188a 359
7 564
3a 355

7b 564
37 Mis'819

— — — — —
DUTCHES GENERAL TERM, January, 1850. *Barculo, McCoun, and Morse, Justices.*

TILLOU & DOTY vs. THE CLINTON AND ESSEX MUTUAL INSURANCE COMPANY.

A material alteration of an instrument by the party seeking to enforce the same, made without the consent of the party executing it, will vitiate the paper, and deprive the holder of all rights under it.

Where an alteration is suspicious, and beneficial to the holder of the paper, the presumption is against the party who sets up the paper; and he is required to explain it, before he can recover.

It is always a question for the *court*, to decide, whether a paper is proper to be read in evidence, to the jury.

The reason of this rule is most emphatically applicable to the case of an altered or mutilated instrument, where the alteration is of such a character that the law pronounces the paper absolutely void, until explained.

But where, in such a case, the plaintiff offers evidence which affords a *prima facie* explanation of the mutilation; or the fact of mutilation comes out on the part of the defence, after the plaintiff has made out his case, the case should be submitted to the jury.

THIS was an action of assumpsit on a policy of insurance. The defendants pleaded the general issue and gave notice of special matter in evidence. The cause came on to be tried before Justice Barculo at the Dutchess circuit in December, 1848. The plaintiffs produced and proved the original policy of insurance; also the notice and preliminary proofs, which were admitted to have been duly served. The plaintiffs also proved

Tillou v. The Clinton and Essex Mutual Ins. Co.

the burning of the property insured on the 28th day of July, 1847. The plaintiffs also presented a paper of which the following is a copy :

“ Hyde Park, July 12, 1847.

Mr. Richard Keese, Sir: We notify you that there was a mistake in our application to you for policy. The application says there was three thousand dollars in the Kingston Mutual Insurance Company, when there is but two thousand five hundred dollars. We also notify you that we have effected a policy in the Hartford Insurance Company on the said mill of two thousand dollars, and wish you to send us a certificate of your notice of the above policies.

TILLOU & DOTY.

Mr. Richard Keese, secretary of the Clinton and Essex Mutual Insurance Company.”

“ Office C. & E. Mutual Ins. Co. July 16, 1847.

The consent of the company is given to the above.

RICHARD KEESE, director and sec'y.”

To the introduction of this paper the defendants' counsel objected. The plaintiffs then proved by a witness that Richard Keese acknowledged to him that the consent to said paper was in his hand-writing, and that he was secretary and director of said company. On his cross-examination the witness testified that Keese further stated that said assent had a postscript appended which had been torn off of the paper, which postscript stated that the insurance company consented to the insurance mentioned in the notice, provided the whole amount did not exceed two-thirds of the value of the buildings. The plaintiffs offered the notice and consent in evidence; which was objected to. The court decided that the paper could not be received: to which decision the counsel for the plaintiffs took exceptions. The plaintiffs further proved by another witness that the said Keese was at Hyde Park the day after the grist mill mentioned in the policy was destroyed by fire, which was on the 28th day of July, 1847; that he conversed with him in respect to said fire; that said Keese first said that the consent he had given was in substance as follows: “The consent of the company is given to the above, provided the whole amount of the insurance

Tillou v. The Clinton and Essex Mutual Ins. Co.

does not exceed two-thirds of the value of the buildings," signed "Richard Keese, director and secretary;" that when the said paper was produced and shown to him he then stated that there was another consent sent after the above; that after sending the assent with the postscript, the plaintiffs had written to him that the first assent was not received, and that thereupon, believing the letter to be lost, he wrote a second letter containing his consent with the same condition in the body of the second letter which was in the postscript of the first letter; that on the witness stating to him that they had a right to insist upon the first consent they had received, Keese insisted that the first consent was contained in a postscript, which had been torn off. Upon this testimony the plaintiffs' counsel again offered the said letter and consent in evidence to the jury; which offer the court rejected, and the counsel for the plaintiffs excepted to the decision. The plaintiffs then called another witness, who testified that he was acquainted with said Keese; that he was secretary and director of the said insurance company; that the witness had seen him write; was acquainted with his hand-writing, and that the consent, body and signature, was in said Keese's hand-writing. Upon which the plaintiffs' counsel again offered the paper to go to the jury, which was objected to by the counsel for the defendants, and the court decided that the same could not be read in evidence. To which decision the counsel for the plaintiffs excepted. The plaintiffs' counsel then offered to prove a second notice, dated July 17, 1847, of the same contents of the first, sent to the defendants and received back by the plaintiffs, July, 30, 1847, upon which was written a consent in the words following, to wit:

"Office C. & E. Mutual Ins. Co. July 27, 1847.

Messrs. Tillou & Doty,

Gents. The consent of the company is given, if the whole amount of insurance does not exceed two-thirds of the value of the property insured.

RICHARD KEESE, director and secretary.

The other notice was received and answered, but may have miscarried.

R. KEESE."

Tillou v. The Clinton and Essex Mutual Ins. Co.

This was offered by way of explaining the mistake of Keese in supposing the first paper contained the conditions insisted on by him. The plaintiffs' counsel offered to let both papers go to the jury; which was objected to by defendants' counsel. Upon which the court decided that the last paper offered might be proved and read in evidence to the jury, but that the first paper or consent could not go to the jury. To which decision the counsel for the plaintiffs excepted, and rested. Whereupon the court ordered judgment of nonsuit to be entered; to which the counsel for the plaintiffs excepted; and upon a case, moved for a new trial.

Jno. Thompson, for the plaintiffs.

H. Swift, for the defendants.

By the Court, BARCULO, J. The evidence touching the consent bearing date the 16th July, 1847, together with the torn appearance of the paper, was sufficient to authorize the conclusion drawn by the judge at the circuit, that the paper had been *essentially altered* by the plaintiffs after it had been transmitted to them by the secretary of the defendants. The execution of the consent was proved by the admission of the secretary; who accompanied the admission with the declaration that the paper had been since mutilated. The evidence of the alteration is, therefore, of as high a character as that of its execution; and although some of the recent authorities hold that a portion of an admission may be *believed* and a portion *disbelieved*, it can not be denied that the tribunal which is to try the question of fact, *may* believe *both* portions. In this case the judge at the circuit, considering this statement confirmed by the mutilated appearance of the paper, found, as a question of fact, that the alteration had been improperly made by the plaintiffs since the execution of the paper.

As a question of law, I apprehend that it will not be contended that such an alteration did not vitiate the paper, and

Tillou v. The Clinton and Essex Mutual Ins. Co.

deprive the plaintiffs of all rights under it. (8 *Cowen*, 71. 12 *Wend.* 173.)

It has long been a disputed point whether the burden of explaining an alteration apparent upon a paper devolved upon the party seeking to enforce it, or the party sought to be charged. It would seem that, in some of the states, an alteration, not peculiarly suspicious, must be presumed to have been made before execution. (11 *Conn. Rep.*, 531. 1 *Halstead*, 215. *Cowen & Hill's Notes*, 298, 1317, &c.) But when the alteration is suspicious, and beneficial to the holder of the paper, the more sensible rule prevails, at least in this state and in England, that the presumption is against the party who sets up the paper; and he is required to explain it, before he can recover. (2 *Wend.* 555. *Vide also note to Waring v. Smyth*, 2 *Barb. Ch. Rep.* 119.)

But it is contended that the case should have been submitted to the jury. This would have been true, if the plaintiff had offered evidence which afforded a *prima facie* explanation of the mutilation; or if the fact of mutilation had come out on the part of the defence, after the plaintiffs had made out their case. But no explanation was given, or offered. The evidence which professed to explain, or rather to deny, the alteration, tended strongly to establish the fact, and confirm the declaration of the secretary.

As I understand the rule, it is always a question for the *court* to decide, whether a paper is proper to be read in evidence to the jury. The reason of the rule is most emphatically applicable to the present case; for the alteration was of such a character as that the law pronounces the paper absolutely void, until explained. If, therefore, the case had been submitted to the jury and a verdict found for the plaintiffs on that evidence, this court would have been compelled to set aside the verdict; and in all such cases it is the obvious duty of the judge to direct a nonsuit; even if both parties have given testimony. (*Graham on New Trials*, 280.) It is not unusual for the judge to reject the altered paper, and direct a nonsuit. In the case of *Penny v. Corwith*, (18 *John.* 499,) a submission to arbitrators

Tillou v. The Clinton and Essex Mutual Ins. Co.

was offered in evidence, but it appearing that a black line had been drawn through the name of one of the parties, since its execution, the judge refused to permit it to be read in evidence, unless the plaintiff showed that the *rasura* had been made by the consent of the parties. The plaintiff then offered to prove the fact; but the judge rejected all evidence on that point, except that of the *subscribing witness*, and nonsuited the plaintiff: and for this last ruling of the judge, a new trial was granted. So in the case of the *Adm'r's of Price v. Adm'r's of Tallman*, (1 *Coxe*, 447,) a bond was produced, and the subscribing witness stated that there had been a writing at the foot of the bond, which had been cut off. The court would not permit the bond to be read in evidence, although the plaintiff offered to prove the contents of the writing torn off, and to satisfy the jury that it was immaterial. The plaintiff was *nonsuited*.

In *Knight v. Clements*, (8 *A. & E.* 215,) a bill of exchange was offered by the plaintiff, but it appeared that the word "three" had been blotted, and "two" written upon it. The court held that the plaintiff was bound to explain it *by evidence*, and that the jury could not infer from the appearance of the bill that the alterations had been made when the bill was drawn; and a *nonsuit was ordered*. (See also 2 *Starkie's Rep.* 313; 5 *Bing.* 183.)

That it is a question for the court, when objection is made to the admissibility of the evidence, is shown by the case of *Ross v. Gould*, (5 *Greenl.* 204, cited 1 *Greenl. Ev.* 599.)

The motion for a new trial must be denied.

New trial denied.

SAME TERM. *Before the same Justices.*

TILLOU and others vs. THE KINGSTON MUTUAL INSURANCE COMPANY.

The holder of a mortgage has an insurable interest in the mortgaged premises.

And the consent of the insurers that a policy previously issued to the owners of the property, may be assigned to the holder of the mortgage, will be deemed in the nature of a contract with him, by which he becomes insured, to the amount which the assignment was intended to secure.

And although the original parties assured may, by a violation of some of the conditions of the policy, after an assignment of the policy for a part of the amount insured, forfeit their rights to the residue, they can not, *it seems*, by any act of theirs, defeat the rights of the assignee, under the policy.

A mere statement, in a notice of alterations, by the assured, that a machine put up by them upon the premises, is designed "for burning hard coal," will not be considered as a covenant or agreement that it shall be used with hard coal; or as binding the assured not to use other fuel, should it become necessary, and it can be used without increasing the risk.

Where several owners of property are jointly insured, a sale by one of the owners, of his interest in the premises, to the other owners, is not such an *alienation* of the property as will avoid the policy, under a provision in the act under which the insurance company was incorporated, declaring that when any property insured with such company, shall be "alienated by sale or otherwise," the policy shall become void.

THIS was an action of assumpsit, brought by Tillou, Doty and Crouse, upon a policy of insurance for \$2500, dated November 1, 1842, upon a grist mill. The defendants pleaded the general issue, and gave notice that they would give in evidence, and insist, in bar of the plaintiffs' recovery, that after the execution and delivery of the policy, and before the loss occurred, viz. on the 4th of April, 1847, Crouse, one of the plaintiffs, who was one of the owners of the property insured, alienated and sold his interest in such property, to Tillou and Doty, the other owners; contrary to the provisions of the charter of the company and the by-laws and regulations thereof; by reason of which the policy became void and of no effect, and the defendants exonerated from any liability thereon. The cause was tried at the Dutchess circuit in December, 1848, before Justice BARCULO,

Tillou v. The Kingston Mutual Ins. Co.

The jury found a special verdict, containing the following, among other facts. That the defendants duly made and executed the policy, and delivered the same. That the policy was assigned to David Ketcham by the assured, on the 1st of May, 1844, by an instrument executed by them, and indorsed upon the policy in these words: "Know all men by these presents, that Carlisle W. Tillou, Oliver W. Doty and Tilly Crouse, the insured in the within policy named, for and in consideration of the sum of \$2000 to them paid by David Ketcham, of Dutchess county, the receipt whereof is hereby acknowledged, do assign and transfer unto the said David Ketcham, his heirs and assigns, the within policy of insurance, and all sums of money, interest, benefit and advantage whatsoever now due, or which may hereafter arise by virtue hereof; to have and to hold the same unto the said David Ketcham, his heirs and assigns forever: this assignment however, to be void on the payment of the said sum, with interest, according to the conditions of a certain mortgage executed by said Tillou, Doty and Crouse, to Eliza B. Hossack, recorded in Dutchess county clerk's office, December 30th, 1843, in liber 58 of mortgages, page 372, &c. and assigned by said Eliza B. Hossack to said David Ketcham, and to be subject to the approval of the company," &c. That the defendants consented to said assignment in the words following: "The Kingston Mutual Insurance Company do hereby consent that the interest of Carlisle W. Tillou, Oliver W. Doty and Tilly Crouse in the within policy, on the terms above set forth, be assigned to David Ketcham, his heirs and assigns. Kingston, May 9th, 1844. JOHN K. TRUMBOUR, Sec'y."

Which consent was indorsed on said policy. That the defendants also received from Tillou and Doty a notice of alterations in the words following:

"Hyde Park, May, 17th, 1847.

To the Kingston Mutual Insurance Company, Honored Sirs, we have put a kiln-drying machine in our mill, it is a cylinder well secured in brick arch, and well secured with a chimney carried out the top of the mill; *it is for burning hard coal.* It is 9 by 4 feet, four feet high, and no chance for the least par-

Tillou v. The Kingston Mutual Ins. Co.

ticle of fire to escape. It is not so much risk as a stove and pipe to the same. We have not started it yet, and want you to act upon it, and let us know immediately.

Yours in haste,

TILLOU & DOTY."

Upon which the said defendants gave to the plaintiffs the consent or certificate following : "Secretary's office of the Kingston Mutual Insurance Company. I hereby certify that a statement of certain alterations as made to the flouring mill insured in policy No. 599 to Tillou, Doty and Crouse, has this day been received at this office, which are adjudged to increase the hazard of said mills and machinery five per cent ; and the increase of premium having been secured thereon, said policy is hereby confirmed unto the said Tillou, Doty and Crouse, the same as though said alterations had not been made.

J. K. TRUMBOUR, Sec'y."

That the grist mill and machinery mentioned in said policy was consumed by fire, on the 28th day of July, 1847, and was worth between 6 and 7 thousand dollars. That the notice and preliminary proofs required by the conditions of said policy were duly made and served on the defendants. That on or about the first day of May, 1847, the said Tilly Crouse sold his interest in the premises insured, and conveyed the same to the other remaining partners, Tillou and Doty ; they the said plaintiffs up to that time, being partners in the milling business. That said Tillou and Doty at the time of taking Crouse's share, applied to William Shaw, one of the directors of said Kingston Mutual Insurance Company, and requested to know if it would avoid the policy, who replied that he did not consider such conveyances an alienation. That the kiln drying machine was designed for coal, but was used with wood, as a general thing ; and that no fire had been in said machine for 36 hours or more before the burning of said mills. That the amount due on \$2000 for interest and principal from three months after serving the preliminary proofs, was \$2146,52. That the amount due on \$2333,33, being the original interest of Tillou and Doty, including the amount assigned, and exclusive of Crouse's, was \$2504,35. That the amount due on \$2500, the whole amount of such

Tillou v. The Kingston Mutual Ins. Co.

insurance, was \$2687.15 ; that the amount due on \$1666.66, said Tillou & Doty's interest if they owned two-thirds of said policy, was \$1778.08.

Jno. Thompson, for the plaintiffs.

Jas. Forsyth, for the defendants.

By the Court, BARCULO, J. The first question to be considered is the effect of the assignment of the policy of insurance to Ketcham to secure a mortgage of \$2000.

This assignment was made with the express consent of the insurance company, endorsed on the policy. Ketcham, at that time, as assignee of the mortgage, had an insurable interest in the premises. The consent of the company must therefore be deemed in the nature of a contract with Ketcham, by which he became insured to the amount of \$2000. Consequently, although Ketcham might perhaps work a forfeiture of his rights under the policy, by a violation of some of its conditions, and, although the original parties assured might also forfeit their rights to the residue of the amount insured, I apprehend that they could not by any violation of the terms of the policy, defeat the rights of Ketcham under the policy. If, therefore, it be conceded that, as between the original parties, the policy has become void, it would still sustain the recovery to the extent of the \$2000.

But I am not prepared to say that there has been any forfeiture whatever. The position maintained by the defendants' counsel, that the policy was avoided by the use of wood instead of coal in the kiln-drying machine, is clearly untenable. For there was no covenant or agreement on the part of the assured that the machine should be used with hard coal. It was a mere statement that the machine was designed "for burning hard coal," without binding the plaintiff not to use other fuel, if it should become necessary ; provided the risk was not thereby increased. In this case the jury do not find that the change increased the hazard, nor is it pretended that there was any

Tillou v. The Kingston Mutual Ins. Co.

fraud in the representation; and I think it would be going much too far to hold such a deviation from the representation sufficient to avoid the contract. (4 *Hill*, 329.)

A much graver question arises upon the conveyance by Crouse of his interest in the premises to the other two plaintiffs. It is claimed by the defendants' counsel that this constituted an *alienation*, within the 7th section of the act, which avoids the policy. That section declares, "that when any property insured with this corporation shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors of said company to be cancelled." (*Laws of 1836*, p. 44.) Under this provision, if the parties had united in a conveyance to a stranger there would be no doubt of its avoiding the policy. If Crouse had conveyed his interest to a stranger the policy would cease to operate as to that share, at least. But it seems to me that the conveyance by Crouse to his copartners stands upon a different footing. It was not strictly speaking an *alienation*, i. e. a transfer from one to another. It was a change of interests among joint owners. No stranger is introduced—no addition to the number of the assured is made. One copartner retires from the concern and sells out his interest to the others. The company, therefore, run no risk of having careless or improvident persons substituted in the place of the original parties with whom they dealt, to guard against which it was a principal object of the statute. It is not, I apprehend, every transfer of title which is to be deemed an *alienation*. Suppose, for instance, that these three parties had been joint tenants, and Crouse had died, by which the whole estate would vest in the survivors, could it be pretended that this was an *alienation*? Or suppose that, being tenants in common, Crouse had died and his interest passed to his heirs, although new persons would be introduced, still I am much mistaken if this could be deemed an *alienation* within the act. Even if the estate should pass by will, instead of descent, I doubt whether it could be held to be such an *alienation* as would work a forfeiture.

It seems to me that our courts have gone quite far enough in giving a strict construction to clauses of forfeiture in these insur-

Tillou v. The Kingston Mutual Ins. Co.

ance acts. A more liberal construction would, perhaps, promote the ends of justice quite as well. In this case I think the spirit of the law has not been violated ; and that we are bound to say that the policy has not been rendered void by the transfer of Crouse's interest to his copartners.

I am aware that some of the authorities seem to militate against these conclusions. Thus the case of *Carpenter v. Washington Ins. Co.* (16 Pet. 495,) may be considered an authority for saying that an assignment of the policy as collateral security does not place it beyond the reach of forfeiture by the misconduct of the assignor. But that case has never been law in this state. (*The Traders' Ins. Co. v. Robert*, 9 Wend. 404.)

Nor is the case of *Howard v. The Albany Ins. Co.* (3 Denio, 301,) a decisive authority to show that a conveyance by one joint owner to another avoids the policy. For that policy was not made under the act in relation to mutual insurance companies : nor is any opinion given in favor of the decision, but only a dissenting opinion by Justice Bronson. On the other hand, in the case of *McMaster & Bruce v. The Westchester Mutual Ins. Co.* (25 Wend. 379,) the learned circuit judge expressed the opinion that a conveyance by one joint owner to another was not an *alienation* within the meaning of the act in question ; which doctrine was not repudiated by this court, although the case was decided upon other grounds.

There is another light in which this case may be viewed. The section in question provides that the grantee of any insured premises, "having the policy assigned to him, may have the same ratified and confirmed to him for his own proper use and benefit, upon application to the directors, and with their consent, within thirty days next after such alienation," &c. This shows that although the statute declares that an alienation shall render the policy *void*, it, in fact, merely renders it voidable at the election of the company, who may elect whether it shall cease to operate or be ratified and confirmed to the alienee. The act does not direct how the ratification and confirmation shall be made or evidenced. Now, in this case, Tillou & Doty are the grantees of Crouse : they may also be deemed the assignees of

Small *v.* Graves.

his interest in the policy, as the conveyance of the premises would *ipso facto* vest in them the right to the insurance money, as between them and Crouse. Tillou & Doty were therefore in a position to demand and obtain from the company such ratification and confirmation if it was necessary for them. Whether this was done or not does not distinctly appear. But it appears that on the 8th day of July, 1847, the company, by their secretary, gave to Tillou & Doty a certificate stating that "due notice had that day been received from Messrs. *Tillou & Doty* of additional insurance having been effected for \$1000 on their flouring mill," &c. This looks very much like a recognition, on the part of the company, of Tillou & Doty as the owners of the premises; and although it may not in itself amount to a ratification or confirmation within the statute, it is nevertheless an item of evidence from which a pretty strong inference may be drawn that such ratification or confirmation had been made. How far this may be a proper consideration upon this special verdict it is not necessary to inquire; as we prefer to rest our decision upon the broad ground that here has not been such an alienation as avoids the policy.

Judgment for the plaintiffs.

ONEIDA GENERAL TERM, January, 1850. *C. Gray, Pratt, Gridley, and Allen*, Justices.

SMALL *vs.* GRAVES.

The bare omission, by an insolvent debtor, applying to be discharged under the two-thirds act, to insert the name of a creditor in his schedule of debts, or the misstatement of the amount due any creditor, will not, alone, vitiate the discharge. The omission or misstatement must be intentional, with a view to a "fraudulent concealment." If not intentional it will not be fraudulent. The fact that a person becomes a petitioning creditor of an insolvent, for the non-

Small v. Graves.

inal amount of a debt purchased by him, at a discount, rather than for the amount paid by him, will not, *per se*, vitiate the discharge.

The act which will vitiate the discharge must be an act of the insolvent. He must *procure* the creditor to become a petitioner for a larger amount than is in good faith due him; and this must be done in order to obtain a discharge.

Where the petitioning creditor purchased the demand three or four years before the debtor applied for his discharge, and there was no evidence that the creditor did not hold it as a debt against the insolvent, to the full amount, or that the latter had any knowledge of the circumstances attending such purchase, or of the amount paid for the demand; *Held* that the mere fact of the creditor signing the insolvent's petition as a creditor for the full amount of the demand, when he had purchased the same for a less amount, would not avoid the discharge.

THIS action was tried at the Onondaga circuit before Shankland, J. and was upon a promissory note made by the defendant, dated March 4, 1842, payable in five months, to J. C. Norton or bearer, for \$200. The defendant pleaded in bar of the action a discharge by the first judge of Onondaga county on the 26th of January, 1847, in pursuance of the statute concerning "voluntary assignments made pursuant to the application of an insolvent and his creditors." The plaintiff replied that the discharge was obtained by fraud, and in a notice annexed to the replication specified the acts of fraud which he would prove, and upon which he would rely to invalidate the discharge. After the proof of the execution of the note, the insolvent papers of the defendant were given in evidence, from which it appeared that Perigo Austin, who was father-in-law of the defendant, was a petitioning creditor of the defendant, upon an indebtedness amounting to \$2,439.88. That the debt of the plaintiff was not named or stated in the petition or schedule. That a debt appeared in the schedule to be due originally to one Barber, of \$230.40, stated to be in judgment against the defendant, and to have been assigned to Austin. That the debt to Austin of \$2439.88 included the Barber judgment. That the whole amount of the debts of the defendant, as stated in the schedule, was \$3605.88, and the amount of the debts due to the petitioning creditors, was \$2633.40. The plaintiff also proved that Austin bought the Barber judgment and paid therefor in wood worth from \$75 to \$100. The justice charged the jury that no

Small *v.* Graves.

act of fraud had been proved, to vitiate the discharge, and the plaintiff excepted. The plaintiff's counsel then requested the judge to charge that the discharge of the defendant was void, for the reason that Austin was a petitioning creditor for the nominal amount of the Barber debt and not for the amount paid by him. The judge refused so to charge, and the plaintiff's counsel excepted. The jury rendered a verdict for the defendant, and the plaintiff now moved for a new trial, on a bill of exceptions.

W. H. Jewett, for the plaintiff.

D. D. Hillis, for the defendant.

By the Court, ALLEN, J. It is provided by statute that every discharge granted under the article by virtue of which the defendant claims to have been discharged shall be void if the insolvent shall fraudulently conceal the names of any of his creditors, or the amount of any sum due to any of them. (2 R. S. 23, § 35, sub. 4.) The bare omission by the insolvent to insert the name of a creditor in the schedule of debts, or the misstatement of the amount due any creditor will not, alone, vitiate the discharge. The omission or misstatement must be intentional, with a view to a "*fraudulent concealment*." The intent gives character to the act, and if there is in this case any evidence tending to show a fraudulent intent on the part of the insolvent, the question should have been submitted to the jury; for the omission of the plaintiff's debt in the schedule is conceded. (*Slidell v. McCrea*, 1 *Wend.* 156.) There were no circumstances proved, to show that the omission to name the debt of the plaintiff was intentional, and if not intentional it could not have been fraudulent. In *Ayres v. Scribner*, (17 *Wend.* 407,) the insolvent had named the plaintiff as a creditor for \$495,93 on *three* notes. He was in fact indebted to him upon *four* notes, to the amount of \$311,52, and the court held that under such circumstances the question whether the defendant wilfully misrepresented the amount due the plaintiff was a question for the

Small *v.* Graves.

jury. The note of the plaintiff in this action was dated in March, 1842. The petition of the defendant was presented to the officer four years and a half thereafter, and without any proof that the defendant had the debt or debtor in his mind at the time of preparing and verifying his schedule. A verdict of the jury that he wilfully or fraudulently concealed the debt, would not have been warranted by the evidence.

II. It is provided by the section of the statute before cited, subdivision 5, that the discharge shall be void if the insolvent shall procure any person to become a petitioning creditor for any sum not due from him to such person, in good faith. By another section it is provided that whenever a petitioning creditor shall have purchased or procured to be assigned to him any debt or demand against the debtor for less than the nominal amount of such debt, the person petitioning shall be deemed a creditor to the amount only of the sum or value actually and in good faith paid by him for such debt. (2 R. S. 36, § 10.) Within the act, therefore, Austin was only a creditor of the defendant in respect to the Barber debt for the amount or value actually paid by him. (*Slidell v. McCrea*, 1 Wend. 156.) It is insisted by the plaintiff's counsel that within the principle of the case cited, the fact that Austin became a petitioning creditor for the nominal amount of the Barber debt, rather than the amount paid by him, *per se* vitiates the discharge. The language of Savage, Ch. J. who pronounced the decision of the court, must be understood in reference to the facts of that case. There the insolvent had procured an assignment of a large claim, to his clerk, for the nominal consideration of one dollar, nothing in fact being paid, and his clerk thereupon became a petitioning creditor for the whole amount of the debt. The learned judge might well inquire "What further proof of actual fraud could be desired?" and say that "the statute makes the act, *per se*, avoid the discharge, without requiring proof of the intent." The insolvent was the actor, throughout, and procured the assignment to his clerk to enable him to become a petitioning creditor, and then procured him to become such petitioning creditor. But in the case before us, the petitioning creditor purchased the debt some

Small *v.* Graves.

three or four years before the application for the benefit of the act, and there is no evidence that Austin did not hold it as a debt, to the full amount, against the defendant, as he lawfully might. Neither is there the slightest evidence that the defendant had any knowledge of the particulars of the transaction by which Austin became the owner of the debt, or the amount he paid for it. It follows that there is a total want of evidence that he knowingly procured Austin to become a petitioning creditor for an amount not due to him in good faith. And although the statute does not speak of the knowledge of the insolvent as necessary to vitiate the discharge, yet giving the statute a reasonable construction, to which it is entitled, it is as essential to be established as any other fact. The consequences of the act prohibited are highly penal, and should not be visited upon the insolvent without fault upon his part. The act which will vitiate the discharge must be an act of the insolvent. He must *procure* the creditor to become a petitioner for a larger amount than is in good faith due him. And this must be done in order to procure a discharge, that is, the insolvent must design to perpetrate a fraud upon the act, and to this, knowledge of the amount paid for the debt, by the creditor, is essential. The provision was designed to prohibit transactions of the character of that commented upon in 1 Wendell; and to apply it to transactions in which the insolvent had acted in good faith would be unwarranted by the act. It would be inconsistent with reason and justice. (6 *Paige*, 323. *Farr v. Marsteller*, 2 *Cranch*, 10.)

Whether two thirds in amount of the creditors of the defendant united with him in his petition for the benefit of the insolvent act, is not material in this action; as the jurisdiction of the officer is admitted by the replication *per fraudem*. (Ayres *v. Scribner*, 17 *Wend.* 407.)

A new trial is denied.

SAME TERM. *Before the same Justices.*RAYNER *vs.* CLARK and LAWRENCE.

An appeal lies to the general term from a judgment entered upon the report of a referee by the direction of a single judge of the court; although the judge did not pass directly upon the amount to which the party recovering was entitled. Upon such appeal, not only the correctness of the report and decision of the referee and the judgment entered thereon, is the subject of review, but a prior order made by the judge declaring the answer of the defendants frivolous and directing judgment for the plaintiff, is properly before the court.

A judgment, rendered against a surety in a bond as well as the principal, for an amount exceeding the penalty, is erroneous.

The liability of a surety is limited in amount, by the penalty of his bond; and he can in no event become liable for a greater amount.

If a complaint does not state facts sufficient to constitute a cause of action, the defect will not be waived by the omission of the defendant to demur, for that cause.

But for such a defect in substance, in the complaint, the defendant may appeal from the judgment, to the general term.

In an action upon bond given upon the arrest of a party upon an attachment issued for a contempt of court, the plaintiff should state and show, in his complaint, his connection with, and relation to, the attachment proceedings, and how, and to what extent, he was aggrieved by the acts of the defendant.

The order of the court, for the prosecution of such a bond, only operates as an assignment to the aggrieved party; and the fact that the person bringing the action is the aggrieved party must be averred in the complaint, and proved upon the trial.

THIS was an appeal from a judgment entered upon the report of the clerk. The action was upon a bond in the penalty of \$250, given upon the arrest of Clark on an attachment for an alledged contempt of court. The plaintiff, in his complaint, alledged the making of the bond to the sheriff of the county of Madison, and set it out *in haec verba*. It was conditioned for the appearance of Clark at the next special term to be held in the county, to answer for the contempt, and abide the order of the court. The plaintiff then averred the non-appearance of Clark according to the condition of the bond, and that the bond thereby became forfeited and the defendants became liable to pay the penalty, and that the court ordered the bond to be de-

Rayner v. Clark.

livered to the plaintiff for prosecution, and claimed judgment for \$250 and interest from April 2, 1849, besides costs. The defendants put in an answer, which, upon motion, was stricken out as frivolous, and judgment ordered for the plaintiff, and that it be referred to the clerk of Onondaga county to assess the damages of the plaintiff, on proof before him. The clerk assessed the damages at \$254,17, and for that amount, besides costs, judgment was perfected, and the defendants appealed therefrom.

J. S. Spencer, for the appellant.

D. D. Hillis, for the respondent.

By the Court, ALLEN, J. By section 348 of the code an appeal may be brought in this court to the general term, from a judgment entered upon the direction of a single judge of the same court. In this case the judgment was entered upon the direction of a single judge, in pursuance of the provisions of section 247; and although the judge did not pass directly upon the amount to which the plaintiff was entitled, an appeal lies to reverse the judgment. The court of appeals have authority to review upon appeal only "actual determinations" of the inferior court; that is, questions upon which the inferior court have actually passed. (*Code*, §§ 11, 333.) But an appeal to the general term of this court, from a judgment of the same court, is put upon a different footing. Not only the correctness of the report and decision of the referee and the judgment entered thereon, is the subject of review, but the order of the judge, declaring the answer of the defendants frivolous and directing judgment for the plaintiff, is properly before us upon the appeal. (*Code*, § 329.)

I. The judgment is erroneous, as it was rendered against the surety as well as the principal, for an amount exceeding the penalty of the bond. The liability of the surety was limited in amount by the penalty of his bond, and he could in no event become liable for a greater amount. (*Clark v. Bush*, 3 Cowen

Rayner v. Clark.

151. *Fairlie v. Lawson*, 5 *Id.* 424.) Perhaps, however, if this were the only difficulty, we might modify the judgment appealed from, and reverse it for the excess over the penalty of the bond, and affirm it for the residue. (*Code*, § 330.) But it is unnecessary to decide this point, or to attempt to put a construction upon the section of the code last quoted.

II. The complaint does not state facts sufficient to constitute a cause of action; and this defect is not waived by the omission of the defendants to demur for that cause. (*Code*, §§ 144, 148.) All that a party admits by suffering a default is the truth of the facts alledged against him; and if a declaration under the former system, did not contain sufficient to show a cause of action, the defendant could, in most instances, take advantage of the defect either by motion in arrest of judgment or writ of error. And for a like defect in substance in the complaint, under the code, the defendant may appeal from the judgment to the general term. The form of the remedy only is changed. (*Callagan v. Hallett*, 1 *Caines*, 104.)

The proceedings in which the bond whereon the action is brought was given, were had under title 13 of chapter 8 of part 3d of the revised statutes. (2 *R. S.* 534.) By that act, (§§ 27, 28, 29,) it is provided that if the defendant against whom an attachment shall have been issued is returned served, do not appear on the return day thereof, the court may order the bond taken upon the arrest to be prosecuted, and that such order shall operate as an assignment of the bond to any aggrieved party, who may maintain an action thereon in his own name, in the same manner as in other actions on bonds with conditions to perform covenants other than for the payment of money, and that the measure of the damages to be assessed in such action, shall be the extent of the loss or injury sustained by such aggrieved party by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment. The plaintiff should have stated and shown, in his complaint, his connection with, and relation to, the attachment proceedings, and how, and to what extent, he was aggrieved by the acts of the defendant. (*McDonald v. Hobson*, 7 *How.*

Rayner v. Clark.

Rep. 745.) For aught that appears in the complaint, the plaintiff has no more right to bring and maintain an action on the bond than any other man ; and if his complaint is good in substance, the *onus probandi* is changed from the plaintiff to the defendant. Instead of its resting upon the plaintiff to make out his case in the first instance, it will devolve upon the defendant to show that the plaintiff was not the aggrieved party, and that he has not sustained damages. By the code, the complaint must contain a statement of the facts constituting the cause of action, in ordinary and concise language. (*Code, § 142, sub. 2.*) At common law, the declaration must have contained a full, regular and methodical statement of the injury which the plaintiff had sustained, and all the circumstances necessary for the support of the action. (1 *Chit. Pl.* 255.) The code has not undertaken to dispense with the substance of the old declaration. In *Thomas v. Cameron*, (17 *Wend.* 59,) the declaration was held good in substance, in a case like the present, upon an averment that the plaintiffs were the parties aggrieved. But in this case there is no such averment ; and damages to the *plaintiff* are not a legal consequence of the non-appearance of Clark upon the return of the attachment, as they would be if it appeared that he was the aggrieved party. (See also *Bank of Buffalo v. Boughton*, 21 *Wend.* 57.) The order of the court, for the prosecution of the bond, only operates as an assignment to the aggrieved party ; and the fact that the party bringing the action is the aggrieved party, must be averred in the complaint and proved upon the trial. The plaintiff in this action has not done it, and was not, therefore, entitled to a judgment. And so much of the order of the judge as directs judgment for the plaintiff, and the judgment, must be reversed. By section 173 of the code, the court may at any time, in furtherance of justice, and on such terms as may be proper, amend pleadings or proceedings by inserting any allegation material to the case. Although the plaintiff was not entitled to a judgment, neither were the defendants, for the reason that they had not, by demurrer or otherwise, put themselves in a situation to ask a judgment in their favor. The plaintiff, upon a reversal of the judgment,

Allen v. Way.

will be placed in the same situation that he was in before the order for judgment. Then, with the answer stricken out, he was in a situation to apply for leave to amend his complaint; and there appears to be no good objection to granting the same relief at this time which would be granted upon special motion. The judgment is therefore reversed, with costs of the appeal; and the plaintiff is at liberty at any time within twenty days, upon payment of the costs of the appeal, to amend his complaint or serve a copy of the amended complaint. The defendants to have twenty days after the service of the amended complaint, upon their attorney, to answer or demur to the same.

7
7th

SAME TERM. Before the same Justices.**ALLEN and others vs. WAY and others.**

The fact that upon the hearing of a cause before a referee a party excepts to the decisions of the referee, and that those exceptions appear in the case made for the purpose of obtaining a new trial, does not make it a bill of exceptions. It is to be treated as a case, *it seems*.

And if from such case the court can see that improper evidence, admitted by the referee, although objected to, did not and could not possibly have injured the party objecting, a new trial will not be granted because of the admission of such evidence.

But if improper evidence is admitted by a referee, in a case where the facts are not clearly and indisputably established without it, a new trial will be granted, notwithstanding the referee states, in his report, that in considering the case and making his report thereon, he rejected such improper evidence. For in such a case the court can not say that the objectionable evidence could not possibly have influenced the referee.

A referee or court can not, while professing to admit evidence absolutely, admit it, in fact, *de bene esse*, and then reject it, upon making up a decision or report upon the whole case. Interlocutory decisions, made upon the trial, can not be reviewed in that manner.

The discretion as well as the authority of a referee, over the interlocutory questions presented in the progress of the trial, ceases with his decision of them; or at least with the trial itself.

Allen v. Way.

THIS was an appeal from a judgment entered upon the report of a referee. The action was for the recovery of the value of a quantity of salt sold by the defendant Way, by the direction of his co-defendant Frazer, and claimed by the plaintiffs as their property. The defendants justified under a judgment and execution against one Bunnell, and claimed that the salt was his property. The plaintiffs proved that in 1848 Bunnell manufactured the salt in question under an arrangement with the firm of Kingsley & Co., by which the latter made advances for the purchase of wood and barrels, and were paid by a lien on the salt ; and that after the salt was manufactured, an arrangement was made between Bunnell, Kingsley & Co. and the plaintiffs, by which the plaintiffs repaid Kingsley & Co. their advances. And there was some evidence tending to show a sale of the salt to the plaintiffs, and that they barreled it, and exercised acts of ownership over it without removing it from the premises where it was manufactured, which were leased by the defendant Frazer to Bunnell. Several questions upon the admission of evidence were made and disposed of, upon the trial, and the referee reported in favor of the defendants, for the value of the salt. From the judgment entered upon such report the defendants appealed.

J. S. Spencer, for the appellants.

P. Outwater, Jr. for the respondents.

By the Court, ALLEN, J. Upon the trial of the cause, several exceptions were taken by the defendants to the decision of the referee, admitting evidence objected to by the defendants, but which the referee, by notes inserted in the case, states that he rejected in considering the case and making his report thereon. There was no question reserved upon the trial in relation to the admission of this evidence, to be thereafter considered and decided by the referee ; and one question is whether a referee can, in the manner adopted in this instance, review his decisions made upon the trial, and whether by such review a party loses

Allen v. Way.

the benefit of his exceptions. By the code trials by the court and by referees are conducted, and decisions reviewed, in the same manner; and as the code has not made special provisions in relation to exceptions taken in the progress of trials, the rights of parties must depend upon the established practice of the courts, so far as it can be applied to the new system. In reviewing judgments of justices of the peace, it has been repeatedly held that the admission of illegal evidence was cause for reversal of the judgment, notwithstanding the justice returned that he disregarded the evidence, in case of a trial without a jury, or upon a trial by jury directed them that the evidence was incompetent, and that they should disregard it." (*Haswell v. Bussing*, 10 *John.* 128. *Penfield v. Carpender*, 13 *Id.* 350. *Irvine v. Cook*, 15 *Id.* 239.)

In *Marquand v. Webb*, (16 *John.* 89,) upon error to the mayor's court of New-York, the superior court, Spencer, J. delivering the opinion, reversed the judgment of the court below on account of the admission of improper evidence, although the evidence admitted was merely cumulative, the same fact having been proved by two other witnesses. This doctrine was approved and confirmed by the court for the correction of errors, in *Osgood v. Manhattan Company*, (3 *Cowen*, 612.) It has been held, however, that when the objectionable testimony is such as can not possibly mislead, or has been waived expressly or impliedly by the party introducing it, the court will not disturb the verdict, as in *Norris v. Badger*, (6 *Cowen*, 449,) where a party was allowed to prove incumbrances upon certain premises by parol, but in a subsequent stage of the trial he fully established the existence of the same incumbrances by competent evidence. The court in that case say, "the admission of it [the parol evidence] might be error, had it been possible that the jury placed any reliance upon it, or could have been misled by it. Going into documentary proof was equivalent to a waiver of the parol evidence, which takes away the error." But in this class of cases the acts which are held to take away error are the acts of the party waiving the illegal evidence, and transpire upon the trial, and are known to the adverse party, so that there is no

Allen v. Way.

controversy about the facts sought to be established by the incompetent evidence. (*Smith v. Kerr*, 1 *Barb. & C. Rep.* 155.) In *Northrop v. Wright*, (24 *Wend.* 221,) the court denied the motion for a new trial, upon a case, although the declarations of the defendant's grantor were improperly admitted in evidence against him; the court saying that "the case, especially as to ownership, the point to which the improper evidence related, was entirely sustained without it." But they also say that were it a question made by a bill of exceptions, they should be bound to grant a new trial. Whether this proceeding is to be treated as a motion for a new trial upon a case, or as a proceeding analogous to a motion for a new trial upon a bill of exceptions, or in the nature of a writ of error, is not very clear. The whole case is presented as provided by rule 24, and as it would have been presented under the former practice. Under that system it would have been but a motion for a new trial, upon the case, and error would not lie to the decision of this court upon a case containing the whole evidence, as this does. The fact that the party has taken exceptions to the decision of the referee, and that these exceptions appear in the case, does not make it a bill of exceptions; and my impression is that it is to be treated as a case, and that if from the case we can see that the objectionable evidence did not and could not possibly have injured the defendants, a new trial should be denied; or, in other words, the judgment be affirmed. But there is great difficulty in saying that the evidence, if incompetent, did not prejudice the defendants. It would be liable to great abuse if a referee or court could admit evidence in fact *de bene esse*, although professedly to admit it absolutely, and then reject it upon making up a decision or report upon the whole case. (*Miller v. Haswell*, *sup.*) The rights of both parties might be prejudiced by the act of the court or referee in thus reviewing their interlocutory decisions.

(1.) The party whose evidence is at first admitted, and finally rejected, loses the opportunity of excepting to the final decision by which his evidence is excluded, as well as the opportunity of supplying evidence of the same facts, from some other source.

(2.) The party against whom the evidence is admitted, relying

Allen v. Way.

upon the ruling, may, for aught that can appear, have presented his case in an entirely different manner from that in which, but for the admission of the objectionable evidence, he would have done. It is a power which cannot be safely exercised by a referee. His discretion, as well as his authority over the interlocutory questions presented in the progress of the trial, ceases with his decision of them, or at least with the trial itself. Probably during the trial an error in the admission or rejection of evidence may be cured; for during that time the parties may be placed in the same position in which they were before the error.

In this case the evidence of title in the plaintiffs was not so clear or conclusive that we could say that it was proved beyond dispute, and that for that reason the evidence, if improper, could have had no possible influence upon the referee. If the referee had no power to revise his decision and reject the evidence, then if the evidence was incompetent a new trial must be granted as the fact was not clearly and indisputably established, without the objectionable evidence. (*Prince v. Shepard*, 9 *Pick.* 176, and cases cited above.)

The declarations of Bunnell, after the alledged sale to the plaintiffs, were inadmissible as against the defendants, to prove such sale. Bunnell was a competent witness, and should have been produced and examined as such. (*Paige v. Cagwin*, 7 *Hill*, 361.) And in one instance the declarations proved went further than to establish the fact of the transfer. They were given in evidence to prove the state of the accounts between him and the plaintiffs, after the sale of the salt to them. For these errors of the referee the judgment must be reversed and a new trial granted: costs to abide the event.

SAME TERM. *Before the same Justices.*

CONVERSE, administrator, &c. vs. KELLOGG and others, executors, &c. and others.

7	560
127a	537
7	550
74b	529
7b	590
168a195	

A testator, by his will, which took effect in 1836, after sundry bequests to his wife, children, and others, devised as follows: "I give and bequeath all the rest and residue of my estate, after payment of my debts, funeral charges and legacies above mentioned, unto my said children, (naming them,) their heirs and assigns for ever, equally to be divided between them share and share alike, and to the descendants of such of my children as shall have died, in equal portions, that is, such descendants to take the same to which their ancestor would have been entitled if living; but no division to be made until ten years after the death of my said wife." By an agreement made between the plaintiff C., and his wife M. A. C., (his intestate,) who was a daughter of the testator, and the executors, on the 4th of May, 1840, C. and his wife in consideration of \$7000, a part of the residue of said estate then advanced to them by the executors, sold and transferred to the executors all their share in the residuary portion of the estate belonging to them or either of them, under the will of the testator or otherwise, to have and to hold till a final division of the estate should be made, when the sum then paid, with interest, was to be deducted from their share. And they covenanted that they would not, during the life of the widow, claim, demand, or sue for their share of the estate, nor do any act to impair the will of the testator. In a suit by C., as administrator of his deceased wife, against the executors, heirs at law, and next of kin of the testator, for an account by the executors, and to recover his wife's share of the residuary estate;

Held. 1. That by the will, the children of the testator, living at his death, and the descendants of those who had then died, took a vested interest in the residuary estate, at the death of the testator.

2. That the devise both of the real and personal estate was valid, as vesting a present interest in the beneficiaries.
3. That the condition annexed to the devise, that no division should be made until ten years after the death of the widow, was void, as to the personal estate, as suspending the absolute ownership thereof for a period beyond the time prescribed by the statute.
4. That the covenant or agreement of May 4th, 1840, was void.
5. That C., the plaintiff, was entitled to an account from the executors, in respect to the rents and profits of the real estate, from the death of the testator, during the life of his intestate, and a full account in relation to the personal estate.

THIS action was brought by the administrator of Mary Ann Converse, a daughter of Daniel Kellogg deceased, against the executors, heirs at law and next of kin of Mr. Kellogg, for an accounting by the executors, and to recover the share of the

Converse v. Kellogg.

plaintiff's intestate of a large part of the estate alledged to have been undisposed of by the will of the testator. Mr. Kellogg died in 1836, leaving a large estate, real and personal, having first made his will, which, after sundry bequests to his wife, children, and others having claims upon his bounty, contained the following clause : "I give and bequeath all the rest and residue of my estate, after payment of my debts, funeral charges, and legacies above mentioned, unto my said children, (naming them) their heirs and assigns for ever, equally to be divided between them share and share alike, and to the descendants of such of my children as shall have died, in equal portions, that is, such descendants to take the same to which their ancestor would have been entitled if living ; *but no division to be made until ten years after the death of my said wife.*" The widow of the testator was still living, and the plaintiff claimed that the residuary clause quoted above was void as suspending the power of alienation of the real estate, and the absolute ownership of the personal property, for a longer period than during the continuance of two lives in being at the death of the testator. The executors insisted upon the validity of the residuary clause, and also insisted, as a bar to this action, upon an agreement made by the plaintiff and his wife (his intestate) on the 4th of May, 1840, by which, in consideration of \$7000, a part of the residue of said estate then advanced to them by the executors, they sold and transferred to the executors all their share in the residuary portion of the estate belonging to them or either of them, under the will of said Kellogg or otherwise, to have and to hold till a final division of the estate should be made, when the sum then paid, with interest, was to be deducted from their share ; and they covenanted that they would not during the life of the widow of said Kellogg, claim, demand, or sue for their share of the estate, nor do any act to impair the will of said Kellogg. The cause was tried before Pratt, Justice ; who decided that the residuary clause in the will was void, and that the real and personal estate mentioned in that clause was undisposed of by the will, and descended to the heirs and next of kin of the testator, according to the statute ; and that the agreement of the plain-

Converse *v.* Kellogg.

tiff and his intestate, relied upon by the defendants, was void ; and directed an accounting in pursuance of the prayer of the complaint. From this decision and the judgment thereon the executors appealed to this court.

P. Bronson, for the appellants.

G. F. Comstock, for the respondents.

By the Court, ALLEN, J. One question made upon the argument, and to be determined, is whether the descendants of the children of the testator, who by the terms of the will were to share in the residuary portion of the estate, were the descendants of those children who should die before his death, or of those who should die at any time before the time appointed for the final division of the estate. For if the bequest is to the children who shall be living at the expiration of the ten years after the death of the widow of the testator, and the descendants of those who shall die before that time, to the exclusion of those in esse at the death of the testator, it is clearly invalid. The estate would vest in the devisees at the time contemplated for the division, and not before ; and until that time the absolute power of alienation of the real estate, and the absolute ownership of the personal property, would be suspended. And such suspension not being limited to the duration or continuance of two lives in being at the creation of the estate, or death of the testator, the devise would, for that reason, be void. (1 *R. S.* 723, §§ 14, 15. *Id.* 773, § 1. *King v. James*, 16 *Wend.* 61. *Coster v. Lorillard*, 14 *Id.* 265. *Irving v. DeKay*, 9 *Paige*, 521.) If the language of the will imports a present bequest of property to be distributed at a period subsequent to the death of the testator, those persons in esse at the time of his death, answering the description of the devisees named in the will, will take vested interests, subject, however, to open and let in others who may come into being and belong to the class at the time appointed for the distribution. (*Collin v. Collin*, 1 *Berb. Ch. Rep.* 630.) Whether the rule can apply to the devise of a

Converse *v.* Kellogg

chattel may be questionable. For of that it is said there can be no remainder which may vest and afterwards open and let in after-born children. That a devise of chattels would be contingent until the time appointed for distribution in cases where a similar devise of real estate would be held to vest a present interest at the death of the testator, subject to open and let in after-born children. (*Dingley v. Dingley*, 5 *Mass. Rep.* 535.)

The intent of the testator is to be gathered from the words employed by him; and a literal construction should be put upon the clause, so as to uphold it if possible, and carry into effect that intent. If the words used are ambiguous, and susceptible of more than one interpretation, that interpretation should be given them which will uphold the devise consistently with the rules of law and the manifest intent of the testator, *ut res magis valeat quam pereat*. (*Co. Litt.* 36 a.) The will speaks at the death of the testator; and there is nothing in the language of the bequest indicating an intent to postpone the vesting of the estate in the beneficiaries to a future period. The party to take under a will should, if possible and consistent with the terms of the will, be determined at the death of the testator; and the estate should then vest in interest, unless there be clear evidence of an intention to the contrary. (*Wrightson v. Macauley*, 14 *Mees. & Wels.* 214; *S. C. 4 Hare*, 487. *Dor dem. Winter v. Perrott*, 3 *M. & Scott*, 586.) If the clause is read without reference to the last paragraph, postponing the final division of the estate, no question can arise as to the palpable intent of the testator to vest the residue of his estate not before disposed of, at once, in his children living at the time of his death, and the descendants of such as had before then died. There is no other time to which the vesting of the estate in the devisees can be referred. No intermediate estate is carved out, no trust is created. The bequest is direct, absolute, and unconditional. It is true that upon the idea that the testator is speaking at the time of his death, the language employed to designate the descendants of his children who shall take the share of their ancestor, is not strictly accurate, in the view now taken of the devise. *Actually* speaking at that time, the testator would

Converse v. Kellogg.

doubtless have said "and to the descendants of such of my children as *have* died," instead of "*shall have* died;" or would have named the children who had died, and whose descendants were to take under the will. But in construing the will to discover the intent rather than the literal and grammatical construction of sentences, we must remember that in fact the language of the testator was uttered several years before his death; and speaking at that time, and intending the bequest to take effect at the time of his death, the language employed was proper to designate as objects of his bounty the descendants of such of his children as should die before his death. But whether the sentence is strictly grammatical is not material. Neither false English nor bad latin will vitiate a deed or will, when the meaning of a party is apparent. (2 *Bl. Com.* 379.) Had the testator, omitting the last clause specifying the time for a division, written out the sentence in full, so as to leave no room for construction, the clause under consideration would have read "and to the descendants of such of my children as shall have died at the time of my decease." The addition of the clause "but no division to be made until ten years after the death of my said wife," so far from conflicting with this construction of the will, in my judgment strengthens and confirms it. It evinces that the testator distinguished intentionally between the vesting of the estate in interest in the beneficiaries, and the actual distribution of the property among them; and while he intended that one event should take place at his death, he was anxious to postpone the other to a future period. (See *Collin v. Collin, and Dingley v. Dingley, supra*; *Cook v. Cook*, 2 *Ves.* 545; *Winslow v. Goodwin*, 7 *Met.* 363; *Weston v. Foster*, *Id.* 297.) By the will, therefore, a present interest in the residuary estate vested in the beneficiaries at the death of the testator, and the clause disposing of that part of the estate is valid, unless it is vitiated by the restriction imposed upon the final distribution. It is well settled that if effect can not, consistently with the rules of law, be given to the entire will, or an entire provision in a will, any part of it may be sustained which is conformable to the rules of law, and which can be separated from the residue.

Converse v. Kellogg.

without doing violence to the testator's general intention. (14 *Wend.* 265. 16 *Id.* 61. *Darling v. Rogers*, 22 *Id.* 483. *Kane v. Gott*, 24 *Id.* 641.) And in this case the bequest and the directions for distribution are distinct provisions, having no necessary connection with each other. The one can stand without the other, and the general intention of the testator in the disposal of his estate, can be carried into effect, although his directions to delay the final division should be illegal, and consequently invalid in whole or in part. (*Irving v. De Kay*, 9 *Paige*, 521. *McDonald v. Walgrave*, 1 *Sand. Ch. Rep.* 274.) It is not material to inquire whether the restraint imposed upon the division of the estate, so far as it is applicable to the real estate of the testator, is repugnant to the estate created by the devise. It by no means follows that the power of alienation is suspended because the right of immediate partition and division is withheld. (*Gott v. Cook*, 7 *Paige*, 521.) The estate vested immediately at the death of the testator, subject to a power of sale in the executors. The executors acquired no estate in the real property. They were not authorized expressly, or by implication, to receive the rents and profits for any purposes of the will. (*Vail v. Vail*, 4 *Paige*, 316.) But whether the real estate was disposed of by the will, and vested immediately in the devisees, or descended to the heirs at law, who are the same persons, and entitled in the same proportion, whether they take as heirs or devisees, is immaterial; as in either case the rents and profits, from the death of the testator, belonged to them and not to the executors. The plaintiff's intestate was therefore entitled to her proportion of the rents from the time of the death of her father; and the plaintiff, as her representative, is entitled to an account of the rents during her lifetime. The defendants admit that they have occupied the real estate and received the rents and profits as executors. Therefore they must account as such, although but for such admission their occupation would, unexplained, be referred to another title. But for the period since the death of the wife, the plaintiff, as her representative, is not entitled to an account in respect to the real estate. His claim, if he has any to the rents

Converse *v.* Kellogg.

after the decease of his wife, is in his own right as tenant by the courtesy, and in that character no claim is made in this action. In relation to the personal estate the question is different, and the plaintiff is not entitled to an account in respect to it, unless it vested absolutely in the devisees at the death of the testator, and the clause prohibiting a division until the lapse of ten years after the death of the widow, is void. The widow is still living, and the time for distribution, according to the terms of the will, has not yet arrived. If the clause prohibiting the division of the estate is repugnant to the gift, it is void, and must be rejected. (4 *Kent's Com.* 131. *Morton v. Reed*, 4 *Simons*, 141. *Schermerhorn v. Negus*, 1 *Denio*, 448.) By 1 *R. S.* 773, § 1, it is provided that "the absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the continuance, and until the termination of not more than two lives in being at the date of the instrument containing such limitations; or if such instrument be a will, for not more than two lives in being at the death of the testator.

If the clause of the will now under consideration suspends the absolute ownership beyond the time prescribed by this act, it is void. If absolute ownership means nothing more than a vesting of the property, with a right of alienation, without the right of possession, then the restriction upon a division of the estate is not in conflict with the statute. But if the term used in the statute includes not only the property but the right to actual, immediate and unconditional possession, then the clause is repugnant to the statute and is void. For beyond all question the condition contemplates the possession of the personal property by the executors in whom it vested, as incident to their office, until the time fixed for the distribution. (*Williams on Executors*, 398.) Until that time there could be no ownership in severalty by the devisees of any part of the property. All would have an interest in every part, but no one would be entitled to any separate part to the exclusion of the others; and neither any nor all of the devisees would be entitled to the possession of the personal estate to the exclusion of the executors. The

Converse *v.* Kellogg.

language of the statutes to prevent the undue accumulation of real and personal property, is somewhat different; and this difference may perhaps, in part, be attributed to the different properties of the subjects of legislation. Personal property is strictly and technically the subject of absolute ownership, while, in theory at least, real property is not, but is merely the subject of an estate. (1 *R. S.* 718, § 1. 3 *Kent*, 378. *Williams on Pers. Prop.* 7.) But this does not aid us in determining the meaning of "absolute ownership," as used by the legislature. The word "absolute" was doubtless used as the opposite of "conditional," and in the same sense as "perfect." It signifies without any condition or incumbrance. (*Bouv. Law Dict.*) To constitute a perfect title to real estate there must be the union of actual possession, the right of possession, and the right of property. (4 *Kent*, 373.) Can the title to personal property be said to be perfect, or the ownership "absolute," while one person is the general owner, and another has the possession and the right of possession? In this case the executors had a qualified property in the personal estate, and the right to the possession for the purposes of the will, and if the condition under consideration is valid until the final division among the devisees while the latter were the general owners and entitled to the ultimate possession, the ownership of the devisees was far from absolute. The right of the executors to the possession, and the restraint upon division and actual possession was an encumbrance upon the ownership of the devisees. "Ownership" is the right by which a thing belongs to an individual, to the exclusion of all other persons. In this case, if the condition in restraint of division is valid there are two classes of owners, one general the other special; neither having the absolute ownership. I think by the clause in question the absolute ownership of the personal estate was suspended for a term longer than during the continuance of two lives in being at the death of the testator, and that such condition was void. Again; the appointment of a future and distant time for the final division of the estate necessarily contemplated an accumulation of the interests and profits in the mean time; and as such accumula-

Converse *v.* Kellogg.

tion was not for any of the purposes allowed by law, the condition to which such accumulation was a necessary incident must be void. (1 *R. S.* 773, §§ 3, 4.) The counsel for the appellants relies upon *Hone v. Van Schaick*, (20 *Wend.* 564;) but the decision in that cause was merely that when a testator gave to each of his grandchildren who should be living at the time of his death \$6000, to be paid upon their attaining the age of 21, or marrying, such payment, however, to be subject to the approbation of the parents of the grandchildren, and the time of payment to be fixed by them, the legacies were vested, and not contingent, and that the power given to the parents did not prevent the vesting of the legacies. Judge Bronson says that "the power of disposing of the property could at the most only be suspended for a single life;" and this whether the legacies were vested or contingent, and upon this ground is the decision based. What the judge says further must be read in reference to the facts of that case. He did not consider, or undertake to decide, what was the meaning of the term absolute ownership, as used in the statute, and took no distinction between the statute's application to real and personal property, but treated both as prohibiting restraints upon the power of alienation merely.

The covenant of May 4, 1840, can not avail the defendants in this action. If there were no other objections to its validity, the entire absence of consideration would invalidate it. It was attempted, upon the argument, to uphold it upon the ground that payment to the plaintiff of a portion of the fund belonging to him, without suit, was a benefit to him and a trouble or injury to the defendants. But the benefit to one party or the injury to the other, which can avail as a consideration to support an agreement, must be a benefit to which the party is not entitled except as a consideration of his undertaking, or the injury must be to the legal rights, not to the wrongful claims, of the promisee. If I am right in my conclusions, the money paid to the plaintiff was his, of right, and the payment could not in the nature of things be a legal injury to the executors. As well might it be insisted that the payment of part of a debt overdue, by the debtor, was a valid consideration for an agreement to postpone

Parmelee v. Oswego and Syracuse Railroad Co.

the payment of the residue, and no one would insist that such was the law. (*Pabodie v. King*, 12 *John.* 426.) This was not a compromise of a doubtful claim.

The conclusions to which I have arrived are 1. That by the will the children of the testator living at his death, and the descendants of those who had then died, took as devisees a vested interest in the residuary estate at the death of the testator. 2. That the devise, both of the real and personal estate, is valid as vesting a present interest in the beneficiaries. 3. That the condition annexed to the devise, that no division should be made until ten years after the death of the widow, was void as to the personal estate, as suspending the absolute ownership thereof for a period beyond the time prescribed by statute. 4. That the covenant or agreement of May 4, 1840, is void. 5. That the plaintiff is entitled to an accounting in respect to the rents and profits of the real estate from the death of the testator during the life of his intestate, and a full account in relation to the personal estate.

I think the decree should be modified to conform to these conclusions, and with such modifications, affirmed. The question of costs upon this appeal to be reserved until the final hearing of the cause.

SAME TERM. *Before the same Justices.*

PARMELEE and others vs. THE OSWEGO and SYRACUSE RAILROAD COMPANY and others.

In the year 1841 G. and B. severally applied to the commissioners of the land office to have certain lots at Syracuse set apart to them for the manufacture of coarse salt. Such applications were granted, and resolutions were passed by the commissioners setting apart to the applicants the lands therein described, "for the purpose of erecting works thereon for the manufacture of coarse salt, pursuant to the provisions of Article 4 of Title 10 of Chapter 9 of Part 1 of the

Parmelec v. Oswego and Syracuse Railroad Co.

Revised Statutes." The 107th section of the article of the revised statutes referred to in the resolutions, provides that the occupant under such a resolution shall have four years within which to complete the works, but that the location *shall be void* unless the works shall have been commenced, and one tenth of the capital expended within one year; and that "the land, except such parts thereof as shall have works actually erected thereon, shall be liable to be located by any other individual or company." The 108th section enacts that any part of such location which, at the expiration of the said four years, shall not be actually occupied by manufactoryes, *may be again set apart by the commissioners of the land office to any other person or company, for the erection of such manufactoryes.*" The plaintiffs had succeeded to the rights of G. and B., by assignment. A portion of the lands mentioned in the resolutions were not occupied by manufactoryes, within the four years; but they had been enclosed by the plaintiffs, and improved for agricultural purposes.

In 1848, the defendants, having laid the track of their road through the lands in question, under and pursuant to the provisions of the 7th section of the "act to dispose of certain vacant and unoccupied lands belonging to the Onondaga Salt Springs Reservation," &c. passed April 12, 1848, authorizing them to occupy any of the salt lands belonging to the state, for the use of the road, which should be necessary, on appraisement and payment of the value; the lands were appraised at \$739.50, which sum was paid by the defendants into the treasury of the state, and letters patent were issued by the state, to the defendants, for the land taken by them. In an action of ejectment, brought by the plaintiffs for such land,

Held 1. That the resolutions of the commissioners of the land office were not leases, but agreements; and that regarding them as agreements, they were executory when made, and only became executed *pro tanto*, at the expiration of the four years, so far as the erections had extended over the lands set apart. That as to all the unoccupied lands, such agreements were at all times *executory and permissive only*, or were *licenses* to occupy the lands of the state for a certain purpose, provided certain conditions were complied with. And that as to so much of the lands as the occupant had covered with erections, at the end of four years, the resolutions became a *continuing license*; but as to the residue, the license ceased and became inoperative.

2. That it was a condition precedent that the right should be exercised within the prescribed time, if at all; and that the right not having been so exercised, all interest under the resolutions ceased. And that the plaintiffs' occupation of the premises for agricultural purposes was a violation of the spirit of the resolutions, and an unlawful usurpation of the property of the state.

3. That the plaintiffs were entitled to be relieved in equity from the forfeiture.

4. That the defendants having a title derived from the state, by letters patent executed by the proper authorities, even though it were void, the plaintiffs, who were mere strangers and intruders, could not set up its want of validity, in an action of ejectment. And that the right of the defendants was paramount to that derived by the plaintiffs from their prior unlawful possession.

5. That the validity of such patent could only be controverted in a direct proceed-

Parmelee v. Oswego and Syracuse Railroad Co.

ing to avoid it, by scire facias, or in chancery; and could not be attacked in a collateral proceeding.

A distinction exists, between a party claiming the possession of land without any color of title, and one who has established a title in himself, whose rights are attempted to be subverted through a conveyance emanating from the officers of the government, under the provision of a statute.

In the latter case, the party relying on such a conveyance, must prove all the previous steps necessary to confer on the officer the power of sale. But as against a party who shows no color of right in himself, and even when he shows a title from the state, of a junior date to that conveyed by letters patent, such letters, under the seal of the state, are conclusive until they have been repealed.

It is only when the letters patent are *void on their face*, by reason of being issued contrary to law, or where the grant is of an *estate* contrary to law—as against the prohibition of a statute—that such grant will be held void in a collateral proceeding.

By the act of April 12, 1848, authorizing the commissioners of the land office to lay out into lots, and sell "such portions of the Onondaga salt springs reservation as are not occupied for the manufacture of salt, and which they shall deem unsuited for that purpose, the commissioners are made the judges of the character of the lands; and when they have *decided* upon that question, by directing a sale of a specified portion of such lands, and a purchaser has paid his money into the treasury and received his patent, the people cannot, in an action of ejectment, alledge that the grant is void, without restoring the purchase money. Nor can third persons do it, who have no interest in the question.

In a collateral proceeding by an ejectment, the people would, under such circumstances, be estopped, by the receipt of the purchase money, and their own record of conveyance. And no private person could sustain such a suit, either in law or chancery, without restoring the money he had received. *Per Gridley, J.*

Where the commissioners of the land office have directed a sale of a portion of the lands in the salt springs reservation, and a patent has been issued to the purchaser, evidence that such lands were in fact well suited for the manufacture of salt, is not admissible, to prove that the commissioners have *judged erroneously, or acted corruptly*, and that therefore the grant is void.

It was not the intention of the framers of the constitution, when they forbade the *sale* of lands contiguous to the salt springs, to prohibit the appropriation of such parts of them as might be necessary for public highways, canals or railroads.

An act, therefore, which provides for the taking of such portions of those lands as may be necessary for the construction of a railroad, upon the appraisal and payment of the damages to the state, occasioned thereby, is not in conflict with the constitutional prohibition of the sale of such lands.

Such an appropriation of the lands is not a sale, within the letter or spirit of the constitution.

THIS was an appeal, by the plaintiffs, from a judgment entered in favor of the defendants, upon the direction and in pursuance of a decision of Justice Pratt, before whom the cause

Parmelee v. Oswego and Syracuse Railroad Co.

was tried. The suit was commenced by summons and complaint, according to the code of procedure, in July, 1848; and was tried in April, 1849, before the justice, without a jury; a trial by jury being waived by the respective parties. The facts appearing in evidence upon the trial are sufficiently set forth in the opinion of GRIDLEY, J. which follows. No question was made by the plaintiffs in respect to the regularity of the organization of the railroad company, or as to the location of the line where the defendants proposed to construct their road. At the close of the evidence, the justice held and decided, as matter of law, that under the resolutions passed by the commissioners of the land office, Gere and Brewster took no right or title whatever in any of the lands embraced therein on which salt erections were not made, except upon a condition precedent that they should within four years, cover such lands with coarse salt works. That inasmuch as Gere and Brewster, or their assigns, had not, within four years from the passing of the resolutions, erected coarse salt works upon that part of the farm lots taken by the railroad company, no right or title had ever vested in Gere and Brewster, or the plaintiffs as their assigns; and consequently that the plaintiffs never had any such interest in the premises as would entitle them to maintain this suit. To this decision the plaintiffs excepted, and filed a bill of exceptions.

Geo. F. Comstock, for the appellants. The defendants have never acquired any right or title whatever to the premises in controversy, nor did they enter under any license or consent. They are therefore mere wrongdoers. I. The only title set up, by the defendants, is one which they claim to have acquired under the act of April 12, 1848. (*Laws of 1848*, p. 466.) Their title under that act is good for nothing, because, II. The act itself, by a fair and sound construction, applies only to such lands as are unsuited to the manufacture of salt; whereas the lands in question are proved to have been well adapted to that purpose. The act also requires a determination to be made by the commissioners of the land office, that the lands to be sold under its provisions are unsuited to that purpose; and no such determina-

Parmelee v. Oswego and Syracuse Railroad Co.

nation was ever made. III: But if the 7th section of the act (under which the defendants claim) applies to lands which are suited to the manufacture of salt, then it is unconstitutional and void. (1.) Such lands must be sold by "authority of law," (*Const. art. 7, § 7,*) and the law must prescribe the lands to be sold. The legislature cannot delegate the power to select such lands as shall be sold. (2.) The legislature itself has no power to surrender up such lands to any person or corporation, except by a sale. But section 7 of the act does not provide for a sale. If it does, then, as we have already seen, such sale could not, under the other provisions of the act, be made until the commissioners should determine that the lands were *unsuited* to the manufacture of salt. (3.) The sale must be under "the direction of the commissioners of the land office." No such thing is provided for in the 7th section of the act. As the defendants are obliged to construe this section, the commissioners have no sort of agency in the matter. The commissioners, under that section, neither make nor direct any sale. If it be a sale at all, the act itself makes it, without any interference on the part of the commissioners. (4.) The sale can only be made "for the purpose of investing the moneys arising therefrom, in other lands alike convenient." But this act does not provide that the moneys arising under the 7th section, shall be invested in other lands. They are simply to be paid into the treasury of the state. (5.) By such sale the aggregate quantity of lands suited to the manufacture of salt "*must not be diminished.*" But by the operation of this act, the quantity is certainly diminished for an indefinite time, (until other lands are purchased,) and may be for ever. The act contains no provision that the quantity shall be maintained; and yet a law, in order to be constitutional, must secure this beyond all possible contingency. (6.) The act makes no provision for compensation to the owners of the land in question, or persons having an interest therein; and it is for that reason void. (*Const. art. 1, §§ 6, 7.*) IV. The act in question was passed April 12, 1848, and took effect in 20 days. But on the 15th of April, appraisers were appointed under the act to appraise these lands. Their appointment, and all their

Parmelee v. Oswego and Syracuse Railroad Co.

proceedings, were therefore void, and this alone is fatal to the defendants' title. V. The patent issued to the railroad company is of no avail to them. This was issued solely under the authority of the act aforesaid, and that act neither required nor authorized any patent; and if the act had authorized it, then the patent would be liable to all the objections already considered. VI. The defendants, therefore, having no sort of right, or title to the lands in question; and having entered as mere wrong-doers, the plaintiffs may maintain this suit to recover from them the possession of such lands. Nor can the defendants set up a want of title in them. They were in the full and peaceable possession of the lands, under claim of title, at the time of the unauthorized entry, and this entitles them to sustain the action. (1 *Cowen*, 613. 5 *John.* 202. 9 *Wend.* 223. 15 *Id.* 171. 11 *John.* 504. 7 *Cowen*, 637.) The court below erred in saying that the act of 1848 enured as a license to the defendants, so as to relieve them from the operation of the principle last stated. VII. But the plaintiffs had more than a mere possession. They had the *right of possession* under the leases from the commissioners of the land office. (1.) Those leases passed a present interest, and not an estate to vest *in futuro*, upon the performance of a condition *precedent*, as supposed by his Honor Judge Pratt. (1 *R. S.* 267, 593, 94, 95. 6 *Pick.* 528. 7 *Conn.* 528. 3 *Pet.* 346. 1 *T. R.* 638, 645. 18 *Conn.* 535. 10 *Pick.* 507. 12 *Shep.* (25 *Maine*) *Rep.* 201, 525. 6 *Serg. & Rawle*, 384.) (2.) If the leases are upon a condition of any sort, it is a *condition subsequent*, and although that may be broken, the defendants have no right to take advantage of the breach. (*Taylor's Land. and Ten.* 59, 60, 133, 134, 138. 9 *Paige*, 127. 6 *B. & Cress.* 519. 4 *Kent's Com.* 126, 7. 4 *Gill & John.* 121. 2 *N. Hamp. Rep.* 120. 9 *Mass.* 501. 4 *Taunt.* 23. *Shep. Touch.* 149.) (3.) The mode of defeating the estate granted by the leases, is specially pointed out by the statute. *The commissioners of the land office may set apart the lands to any other person*, and this is the only mode of defeating it, without the action of the legislature. (4.) The special circumstances of the case prevent a

Parmelee v. Oswego and Syracuse Railroad Co.

forfeiture, even if there is a condition in the leases. The facts proved are equivalent to a performance of such condition. (1 *T. R.* 738, 645. 2 *Bibb*, 218. 2 *Peters*, 102. 2 *Conn.* 494.)

John Ruger & J. L. Bagg, for the respondents. I. Although by the complaint, damages are claimed on account of the defendants' entry on the land, yet the plaintiffs can not, under any circumstances, recover such damages in this suit, as the proofs show that the railroad company took possession and graded the track in the whole, or in part, in the fall of 1847. But the Messrs. Kenyon (two of the plaintiffs) did not acquire any interest in the premises, until May, 1848.

II. The action, as stated in the opinion of the judge, is in the nature of ejectment, and all the rules of evidence and principles, common to ejectment, are applicable to this case. The general and universal rule in ejectment, is that the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's. (*Adams on Eject.* 30. 16 *John. R.* 200. 9 *Cowen*, 86. 4 *John.* 150.) Even a forcible entry on the premises would not estop the defendants from asserting an independent right to retain the possession. The plaintiffs are bound to show such a right or interest in the land as would enable them to maintain ejectment against one entering directly under authority from the state. Or in other words, if the superintendent of the Onondaga salt springs, who is by statute deemed to be in possession of all the state lands in the salt reservation, (*see 1 Rev. 1st ed.* 257, §§ 27, 28,) should enter on the lands in behalf of the state—could the plaintiffs in the case here presented, have maintained trespass or ejectment on such entry? If the plaintiffs had not such an interest or estate in the land as to have authorized a recovery of the possession after forfeiture, then the defendants claim that their entry on the lands was of such a character as to enable them to set up in defence, title to the land in the state, even if they have not acquired title under the provision of the act of 12th of April, 1848, or the act of March 27, 1848, or otherwise. By the act of 12th April, 1848, the defendants were authorized to *occupy any of the salt*

Parmelee v. Oswego and Syracuse Railroad Co.

lands belonging to the state, for the use of the road, which shall be necessary, on appraisement and payment of the appraised value. If these lands did then, in fact belong to the state, and if the state had a right to their possession at any time, it follows that if the defendants did, under the law of 12th April, 1848, take possession before the appraisement, *the state is the only party to complain of such entry*. But this entry by the defendants has been assented to and sanctioned by the state, by *their receipt* of the appraised value of the land; and the defendants, even if they have not acquired a valid title, have a right to insist that they are not trespassers, or mere intruders, but are in possession under a license from the true owners. If such is the true position of the defendants, they have a valid possession of the land, so far as it relates to the plaintiffs; and may, if it is necessary, protect themselves in this action, by setting up title to the land in the state, under the authority of the cases above cited.

III. The defendants have acquired a valid title to the land from the state by virtue of the proceedings under the act of the 12th April, 1848, as well as under the provision of the general railroad act of March 27th, 1848. (*Laws of 1848*, pp. 232, 237, §§ 24, 46.) (1st.) The 7th section of act of 12th April, 1848, has no application to the question whether the lands which the railroad company may require for their track, are suitable or otherwise for the manufacture of coarse salt. (See *Laws of 1848*, p. 468, § 7.) Although the general object of the act is to provide for the sale of the lands which may not be suitable for this purpose, yet the 7th section is an independent provision, and was intended to give the right of way to railroads over *any salt lands* which may be *necessary* for the track of said road. That such was the design of the legislature is evident, not only from the language of the 7th section, but from the nature of the case itself. There is certainly no provision in the present constitution prohibiting the sale of any salt lands, whether they may be suitable and necessary for salt making purposes or otherwise. Although a prohibition existed in the constitution of 1821, prohibiting the sale of lands contiguous to the salt springs

Parmelee v. Oswego and Syracuse Railroad Co.

which might be necessary and convenient for the use of said springs, yet by the new one the authority is expressly given to sell such contiguous lands, "*by authority of law, under the direction of the commissioners of the land office, for the purpose of investing the moneys arising therefrom in other lands alike convenient; but by such sale and purchase the aggregate quantity of land shall not be diminished.*" It would be a very difficult matter to show how this provision of the constitution could be carried out in any manner, by giving it the strict and technical construction, which the plaintiffs do in this case. Any of the lands, however contiguous, convenient, or necessary, for the use of the salt springs may be sold. But it is contended by the appellants that *before such sale, or simultaneous therewith*, an equal quantity at least shall be purchased, so that the aggregate shall not be diminished. This is clearly not the true construction of the constitution; for the constitution clearly implies that such contiguous land shall be sold and paid for, before other lands are purchased; as this clause expressly provides that such purchase shall be made with the moneys *arising from the sale*; so that there must be at all events, a period of time after the sale, before the title to other lands can be acquired. But the section becomes inoperative and void for uncertainty, and impossible of execution, if the commissioners of the land office are precluded from selling such contiguous land until they have purchased an equal amount elsewhere; as there is no provision for paying for the land purchased, except out of the avails of the sales of such contiguous lands; as the *moneys arising from such sale* are to be invested in purchasing other lands, alike convenient. But it is obvious that the various sections of the act of 12th April, 1848, except the 7th section, have no reference to the land, the sale of which is provided for in the 7th section of article 7 of the constitution. This clause in the constitution does not prohibit the sale of any lands: it merely provides as to the manner and purpose of selling such lands as are contiguous to, and necessary and convenient for the use of the salt springs. The great object of the act of 1848 is to sell the lands unsuitable for the manufacture of salt; and the provisions of that act requir-

Parmelee v. Oswego and Syracuse Railroad Co.

ing the avails to be invested in other lands, are not necessary, so far as the constitution is concerned, in any manner; for no restrictions are imposed by the constitution on the sale of unsuitable lands, they being in the same condition of other state lands, and may be sold at any time, under authority of law. (2.) But the defendants insist, that by carrying out the provisions of the 7th section of the act of 1848, in favor of the railroad company, even though the constitution had forbidden the sale of all lands, there would be no violation of such supposed prohibition of the constitution, for the reason that this is not a sale whereby the railroad company may acquire an absolute estate in fee in the land. This 7th section merely authorizes the temporary *use of the land for a public purpose, for a definite period of time*, the title remaining in the state; all the interest the railroad company acquired is the right to use the land for their track during the *continuance of the charter of the company*. (See *Charter Syracuse and Oswego R. R. Co. Laws of 1839*, 254, and *Session Laws of 1836*, 319; *General Railroad act, Laws of 1848*, 228, §§ 24, 46.) If the construction of the constitution as contended for by the plaintiffs, is to prevail, it would follow that commissioners of highways would have no authority to lay out a public road through any of these lands; nor would the state be authorized to make a canal through them, as such use would diminish the aggregate quantity of salt lands. (3.) It is claimed by the plaintiffs that the railroad company has not acquired any valid right to these lands under the 7th section of the act of 1848, for the reason that the appraisers were appointed before the act took effect: rendering all the proceedings void. There are two answers to this objection: First. The commissioners of the land office have ratified and confirmed the acts of the appraisers, so far as the defendants are concerned, by receiving, June 3d, 1848, from defendants, the appraised value of the land so taken, and by ordering the issuing of a patent for the land, on the 5th of October, 1848. Second. Even if any informality in the proceedings of the commissioners under the act of April 12, 1848, would have the effect of rendering the defendants' title voidable at the election of the state; its validity

Parmelee v. Oswego and Syracuse Railroad Co.

can not be questioned by the plaintiffs who have no such estate or interest in the land as would authorize them to make this objection. Their possession could be nothing more than a mere naked one without right as against the state or those who take possession under the authority or license of the state. (4.) But the defendants claimed, that if they derived no right under the 7th section of the act of April 12, 1848, the acceptance of the sum appraised, by the state, as appears by the receipt of such sum into the treasury, may be regarded as an agreement between the commissioners of the land office and the defendants, as to the amount of compensation to which the state was entitled for the land taken; and that the defendants have acquired a legal and valid interest in the land, during the continuance of their charter, according to the provisions of the 24th and 46th sections of the general railroad act. (*Laws of 1848*, p. 232, §§ 24, 46.)

IV. The act of the commissioners, in setting apart the land in question to the plaintiffs, gave them no right to use the land, except upon the *condition* that they should *within four years thereafter* cover it with salt erections. This was a condition *precedent*, and no title vested in the plaintiffs, to any lands upon which such erections were not made within the time limited. Such is the policy of the law. (1 *R. S.* 257, § 107, 108. 2 *Black. Com.* 157, *Phil. ed.* 1822. 4 *Kent's Com.* 124, 125, 2d ed. *Coke's Litt.* 206.) In 2 *Black. Com.* 157, *Phil. ed.* 1822, it is said, "if a condition be precedent, or to be performed before the estate vests, the grantee has no estate until the condition be performed, whether such condition be void or otherwise." In 4 *Kent's Com.* 125, 134, 2d ed. it is said, "Whether a condition be precedent or subsequent, is matter of construction, and depends upon the intention of the party creating the estate." (See also 1 *T. R.* 695; 2 *Bos. & Pull.* 295, 297; 3 *Peters' U. S. R.* 346.) "If the condition be precedent, the estate can not be claimed or vested until the condition be literally performed. And even a court of chancery will never vest an estate when by reason of a condition precedent, it will not

Parmelee v. Owego and Syracuse Railroad Co.

vest at law." (4 *Ken's Com.* 125. *Popham v. Bampfield*, 1 *Vern.* 83.)

V. The state, by not having at the end of four years, dispossessed the plaintiffs, lost no rights thereby, nor did the plaintiffs acquire any rights thereby. No laches can be imputed to the state. Nothing short of a strict performance of the condition upon which the lands were set apart, could enable the plaintiffs to hold possession against the state, or any person acquiring rights from the state, or having a license to enter from the state. As to the effect of waiver and acquiescence, see the following authorities, 1 *John. Cas.* 125; 3 *Taunton*, 78; 4 *Id.* 735; 12 *Moore*, 37. In 3d *Taunton*, the court say, the act by which the forfeiture is waived must amount to the affirmance of the tenancy, or a recognition of its continuance. It is not enough that the lessor knows of the breach, without availing himself of his right of re-entry. Where a lessee carried on a trade by which his lease was forfeited, it was held that the landlord had not waived his right to enter for the forfeiture, by lying by and witnessing the act for six years. On the same principle, the landlord would not waive the non-performance of a condition by silence. Neither can the continued possession of the plaintiffs, after the expiration of the four years, be construed by reason of the silence or acquiescence of the state, as giving the plaintiffs the right to hold these lands from year to year or as a new setting apart of these lands to them, for salt purposes. (6 *B. & Cres.* 519. 9 *D. & R.* 536. 2 *Har. Dig.* 3599. 4 *Taunton*, 735. 6 *Com. Law R.* 462.) Besides, the plaintiffs can gain nothing by any neglect or laches on the part of the state. (*Finsley's Land. & Ten.* 384.) In *Coke Litt.* 57, it is said, "no man can ever be tenant at sufferance against the king, to whom no laches or neglect in not entering or ousting the tenant, is ever imputed by law—but his tenant in holding over, is considered as an absolute intruder."

VI. The act of the state in permitting the railroad company to pass over the land in question, was notice to the plaintiffs of the election of the state to take advantage of the non-performance of the condition, even if any notice was necessary. (*Doe*

Parmelee v. Oswego and Syracuse Railroad Co.

v. *Hawks*, 2 *East*, 481, cited in *Chambers on Leases*, 184.) In the last case, a lease for years was made if the lessee, his executors or administrators should so long inhabit and dwell on the farm demised, and actually occupy the lands, and not let or assign over; the tenant became a bankrupt and his assignees sold the premises. It was held that the lease was void without entry, because this was not a case of forfeiture, but the actual occupation was annexed as a condition of the lease. So in this case the erection of works upon the land within four years, was the condition on which the plaintiffs were to hold the land.

VII. Even if this is to be regarded as a condition subsequent, yet the performance of the condition within four years would be necessary, to enable the plaintiffs to hold possession of the lands in question as against the state or these defendants, and the plaintiffs would have no such right or interest as would enable them to maintain this suit; and this view of the case would sustain all that is material in the opinion of Justice Pratt in giving the decision in this action. For all that is material in such opinion, is that the plaintiffs had no such interest as would enable them to maintain this suit. It can not be material whether the plaintiffs ever acquired any vested right, or having acquired, lost it by non-performance, so long as they had no right to hold these lands against the state or these defendants. Even equitable considerations insisted upon by the plaintiffs in their complaint can not avail them. (1 *Russ. & M.* 506. 2 *Sto. Eq. Juris.* §§ 1321, 22, 23. *Hill v. Barclay*, 16 *Ves.* 403.) Where any penalty or forfeiture is imposed by statute, for the doing or omission of a certain act, then courts of equity will not interfere to mitigate the penalty or forfeiture incurred; for it would be in contravention of the direct expression of the legislative will. (2 *Story's Eq. Jur.* § 1326. 1 *Strange*, 447. 1 *Ball & Beatty*, 373.)

VIII. The testimony given by the plaintiffs, in regard to their intention to erect salt works on these lands after the four years, and the reasons for not doing so, were duly objected to by the defendants, and is clearly irrelevant and improper, as the only object of such testimony was to establish an equitable title in

Parmelee v. Oswego and Syracuse Railroad Co.

the plaintiffs ; and this, even if it was shown by legal testimony, would not authorize an action of ejectment. (*Adams on Eject.* 32. 9 *Cowen*, 88. 9 *John.* 60. 2 *Id.* 236.) See also in relation to allegations and evidence of intentions, 3 *Howard's Sp. T. Rep.* 358.

IX. The application made by the plaintiffs, or those under whom they claim, to the commissioners of the land office, in January, 1848, to have these lands again set apart to them, is an admission of a want of title on their part, and of a forfeiture of all estate in the premises, if they ever had any estate.

X. The law incorporating this railroad company being a public act, and passed for a public benefit, confers upon the corporators the right to pass over any land of the state, if necessary to the purposes of the road ; and no special law is required to confer this right. The rights of the company to take the lands of others for the use of the road, is founded on the assumption, that the land is in law taken by the state through its agent the railroad company. (*Beekman v. Saratoga Railroad Co.* 3 *Paige*, 45.) It is averred in the answer of the defendants that the lands in question taken by the railroad company were necessary to be taken for their use ; and that fact is not denied in the reply.

XI. The grant by the state to the Oswego and Syracuse Railroad Company, to construct a road from Syracuse to Oswego, passed the right to the company, to cross any lands of the state, which would be a necessary incident to the enjoyment of the grant ; because the rule of law is that the granting of a thing, passes the incidents necessary to the enjoyment thereof.

XII. The state may sell any of their lands or property in any manner the legislature shall direct, unless they are prohibited by the constitution. The constitution does not prohibit the sale of any lands, salt or other kinds. Section 7, article 7 of the new constitution merely prescribes the modes and purpose of selling lands "contiguous to, and necessary and convenient for the use of the salt springs," and says, "that such contiguous, necessary and convenient lands for the use of said springs, may be sold by the authority of law, under the direction of the commissioners of the land office, for the purpose of investing the

Parmelee v. Oswego and Syracuse Railroad Co.

moneys arising therefrom in other lands alike convenient, but by such sale and purchase, the aggregate quantity of these lands [meaning lands contiguous, necessary and convenient] shall not be diminished." But this does not prohibit the sale, or prescribe the mode and purpose of the sale, of any other lands, salt or otherwise. If the lands in question are not averred or proved to be such as are mentioned in the 7th section of article 7 of new constitution, that is, to be "lands contiguous to the salt springs, and necessary and convenient for the use of such springs," then it is clear that the state may sell them in any way and for any purpose, the same as any other state lands or property, so far as the constitution is concerned. The lands in question are not averred in the complaint, nor is there any proof showing that they are contiguous or necessary, or convenient to the salt springs. And in fact, the lands in question do not have any of the above qualities. The plaintiffs in their complaint, only alledge that the lands in question "are suitable for salt purposes." This might be said of half the lands in Onondaga county. The legislature being under no prohibition by the constitution, even as to the mode and purpose of selling lands, not contiguous to the salt springs, had the right to sell the lands in question, to any person or corporation, and therefore had the right to enact sections 24 and 46, general railroad act of March 27th, 1848, and 7th section of the act of 12th April, 1848. (See *Sess. Laws 1848, pp. 232, 237, 468.*) But even if it had been averred and proved that the lands in question were contiguous, necessary and convenient for the use of the salt springs, yet we insist that the moneys arising from the sale of the lands in question, to the railroad company, will be presumed to have been invested in other lands alike convenient for the use of said springs, because public officers are presumed to have done their duty, in the absence of proof to the contrary. So that if the plaintiffs intended to insist that the moneys arising from the sale to the railroad company, had been misapplied, they should have averred and proved the same. But as to this point there is no averment and no proof. Again, we say that if the commissioners of the land office had the right to sell these lands for any pur-

Parmelee v. Oswego and Syracuse Railroad Co.

pose, it will, in the absence of proof be presumed that they sold for such purpose, and applied the moneys arising therefrom according to the requirements of the constitution. From the act of selling to, receiving pay from, and giving a patent to said railroad company, for the lands in question, in the absence of proof, it will be presumed that all the prerequisites to render that act of the commissioners valid took place. And we insist, that the title of the railroad company would be good, if the commissioners of the land office had a right to sell for any purpose; because we claim we are not to look after state officers, to see that they do their duty. If they violate their duty they will be punished by impeachment or other appropriate punishment, but the company who pay their money will not lose their land. If the plaintiffs ever acquired any rights, they have lost the same by using them for purposes other than for salt erections; and in such use were mere trespassers and intruders.

XIII. A patent of lands by the state, shall be presumed to have issued regularly, and if it be not void on its face, can not be avoided collaterally in a suit between individuals, unless it issued without authority, or against the prohibition of a statute. (*Jackson v. Marsh*, 6 *Cowen*, 281.) Thus, where a patent issued in 1823, for lands, which were occupied, and improved to the value of \$25, on the 17th of February, 1809, it was held that it should be presumed, that satisfactory proof was produced to the commissioners of the land office, that the occupant had been satisfied for his improvements, previous to the date of the patent, pursuant to the statute. (1 *R. L.* 396, 297, § 17.)

XIV. The location and setting apart to the plaintiffs or to those under whom they claim, was not a lease, nor had it the character of a lease, and none of the consequences result from it, which would result from a lease.

By the Court, GRIDLEY, J. This action was brought to recover damages, for the alledged trespass committed by the defendants in excavating and laying the track of the Oswego and Syracuse railroad, through lands claimed by the plaintiffs; and also to recover the possession of the said lands. It appears that

Parmelee v. Oswego and Syracuse Railroad Co.

two of the plaintiffs, Robert C. and Sands N. Kenyon, acquired their interest in the premises in question on the 9th of May, 1848. And there is no evidence in the bill of exceptions, that any acts of the defendants charged as trespasses, were committed after that time. It is stated that the excavation was completed before the month of June; but whether it was or was not completed before the 9th of May, does not appear. Unless it was proved that some of the acts were committed after the Kenyons assigned their title to the premises, that part of the action which seeks to recover damages, must fail. And so I understand the learned justice who tried this cause, without a jury, to have found, as *a question of fact*. I also understood the counsel of the plaintiffs, on the argument, to abandon this part of the action, and to concede that the only question remaining for the decision of this court, was that which involves the title and possessory right to the premises in question; in other words, the ordinary issue, in an action of ejectment.

I. Under this aspect of the case, the first inquiry is, what right the plaintiffs have established to the lands in controversy. Those lands, are that part of lots 54, 55 and 56, in the Onondaga salt springs reservation, lying west of the city of Syracuse, which is occupied by the track of the defendants' railroad. They were the property of the state; and whatever interest the plaintiffs had in them, rests on the following state of facts.

In the year 1841, one Robert Gere, applied to the commissioners of the land office, to have farm lots Nos. 54 and 55 set apart to him for the manufacture of coarse salt; and one Samuel Brewster, at about the same time, applied to have farm lot No. 56 set apart to him for the same purpose; which applications were respectively granted; and the plaintiffs have succeeded by assignment to the rights of the original applicants. Those rights, such as they are, were assured to the applicants by resolutions of the canal board, of which the following in the case of Gere, as to all its substantial provisions, is a copy. "Resolved that the said application be granted in part, and that the land therein specifically described, excepting therefrom the parcel, &c. and excepting also the parts of streets, &c. be and the same,

Parmelee v. Oswego and Syracuse Railroad Co.

that is to say, farm lots No. 54 and 55, are hereby set apart to the said Robert Gere, for the purpose of erecting works thereon for the manufacture of coarse salt, pursuant to the provisions of article 4 of title 10 of chapter 9 of part 1 of the revised statutes." Sections 104, 105 and 106, (1 R. S. 267,) provide for the application setting forth the amount of capital proposed to be invested in the works, and for the setting apart of the land by the commissioners; and the two following sections declare the rights of the occupants under the resolutions. By the 107th section, it is provided that the occupant shall have four years within which to complete the works, but that the location *shall be void* unless the works shall have been commenced and one-tenth of the capital expended within one year; "and the land, except such parts thereof as shall have works actually erected thereon, *shall be liable to be located by any other individual or company.*" The 108th section enacts that "any part of such location, which at the expiration of the said four years shall *not be actually occupied by manufactories*, pursuant to the intention of the original location, *may be again set apart by the commissioners of the land office, to any other person or company, for the erection of such manufactories.*" The question involving the rights of the plaintiffs, arises under the provisions of the last section. All the lands embraced in the complaint in this action, and a considerable part of the residue of the three farm lots, are still vacant; no works having been erected on them, notwithstanding the four years had elapsed long before the defendants took possession of the premises. The plaintiffs enclosed these vacant lands, and improved them for agricultural purposes. And this, their counsel insists, they had a right to do, upon the ground that they hold these lands under a title, analogous to that created by a conveyance, subject to a condition subsequent, liable to be defeated only by the concurrence of two events; first, the failure to cover the land with erections within four years, and secondly, the actual setting of them apart to another applicant. To this conclusion we can not assent; and we will briefly state the grounds of our opinion.

1st. Conceding for the argument's sake, that we are to regard

Parmele v. Oswego and Syracuse Railroad Co.

the resolution of the commissioners of the land office as a lease, we think that the condition to erect works within four years, on the lands set apart for that purpose, was *precedent* and not *subsequent*, as to all such lands as were not occupied within the prescribed period. It is laid down by Chancellor Kent, (4 *Kent's Com.* 124,) that there are no technical words to distinguish between conditions *precedent* and *subsequent*; and that whether they be the one or the other, is matter of construction, and depends upon the intention of the party creating the estate. None of the cases cited by the plaintiffs' counsel are in principle like the one under consideration. In the case of *Merrill v. Emery*, (10 *Pick.* 507,) the money and family stores, were certainly not intended to be kept till the granddaughter's education was completed, and therefore there could be no pretence for holding the latter to be a condition *precedent*. So too, in *Stark v. Smiley*, (12 *Shep.* 201.) Where the devise contemplated the entering upon the estate and its enjoyment, and where certain provisions for other persons were to be derived from the estate; no doubt could exist that the condition on which it was to depend, was *subsequent* and not *precedent*. Again; in *Merrick v. Andrews*, (12 *Shep.* 525,) where an estate was devised on condition of supporting the testator's mother, the intention was clear that the estate was to vest immediately, subject to forfeiture by a breach of the condition. Equally clear was the intention of the parties in the case of *Hamilton v. Elliott*, (5 *S. & Raw.* 375.) The only other case referred to is that of *Hayden v. Stoughton*, (5 *Pick.* 528,) where land was devised to a town for the building a school house, provided it was built 100 rods from the meeting house. In that case it was properly held that the town had a reasonable time within which to build the school house, and that 20 years was an unreasonable time, and so the condition was broken. In all these cases, and many more which are cited by Chancellor Kent, the intention was manifest, either by positive provision or clear implication, that the estate should vest immediately, subject to be defeated by the breach of the condition annexed. But the case we are considering more nearly resembles *Wells v. Smith*, decided in 2 *Edwards' Ch.*

Parmelee v. Oswego and Syracuse Railroad Co.

Rep. 78, and affirmed by the chancellor in 7 Paige, 22. That was a contract for the sale of a city lot, at a stipulated price, provided the purchaser should by a particular day build and enclose a house, or in default thereof pay \$1000. It was provided that the purchaser should take possession of the premises immediately, and if he did not perform, should leave a shop, which he was to build, on the premises. He did go into possession, and expended considerable sums of money in improvements, and failed to pay the \$1000 at the day, though he tendered it shortly after. It was held that he could have no relief, for the reason that his right depended, not on a condition subsequent, in which case chancery would relieve against the forfeiture, but on a condition precedent, for the breach of which neither law nor chancery furnished any relief. (*Popham v. Bampfield*, 1 Vern. 83. 19 John. 69. 6 Cowen, 627.) The case of *Wells v. Smith* was a much stronger case for the purchaser than is this case, for the plaintiffs. The provisions of the act, under which the right of the plaintiffs arise, are peculiar. In no event does the occupant lose the erections which he may have made, nor the right to use the land on which they stand. Now, if the land originally located were deemed to have been conveyed to him subject to a condition subsequent, he would have forfeited the entire location and all the capital expended upon it. This incident—the forfeiture of the entire estate—is characteristic of a condition subsequent. The grantor enters for condition broken, into the whole premises, and becomes seised of his first estate. (4 Kent, 126. *Shep. Touch. by Preston*, vol. 1, 121, 155.) And therefore conditions subsequent are not favored in law. (4 Kent, 129.) The absence of this distinguishing feature of this species of condition is conclusive against the plaintiffs' claim. The applicant indeed had the whole of the three lots in question set apart for his use. But for what purpose? For nothing, but to erect works thereon for the manufacture of coarse salt. He had no right to enter upon and occupy the premises for any other purpose. And his right to do so for that purpose was limited to four years. Time was here made the essence of the contract, (if the resolution is to be deemed a con-

Parmelee v. Oswego and Syracuse Railroad Co.

tract,) precisely as it was in the case of *Wells v. Smith*. Regarding the resolution as an agreement, it was executory when made, and only became executed, *pro tanto*, at the expiration of the four years, so far as the erections had extended on the lands set apart. As to all the unoccupied lands, it was at all times *executory* and *permissive only*. And at the end of the four years, all right to extend the occupation under the resolution ceased, by the very terms of it. It was a condition precedent that the right should be exercised within the prescribed time, if at all, and not having been so exercised, all right under it ceased; and the very occupation of the premises, for agricultural purposes, was a violation of the spirit of the resolution, and an unlawful usurpation of the property of the state.

2dly. If it be conceded that the resolution is to be construed as a lease, as the counsel contends it should be, it can not be maintained that it is a lease in *perpetuity*; for then the people would have conveyed away an estate of inheritance; nor can it be claimed that the applicant took an estate for life; for that would invest him with the legal title and all the attributes of a freehold estate. If a lease at all, therefore, it must be *quasi* a lease for years. In that event it will be immaterial whether the condition be subsequent or not; for in such case the estate ceases, absolutely, as soon as the condition is broken. Speaking of conditions subsequent, Ch. Kent remarks, on the authority of *Co. Lit.* 215 a, and *Pennant's case*, (3 *Coke*, 64,) that "there is this further distinction to be noticed between a condition annexed to an estate for years, and one annexed to an estate of freehold; that in the former case the estate *ipso facto* ceases as soon as the condition is broken; whereas in the latter case, the breach of the condition does not cause the cesser of the estate without an entry or claim for that purpose. When the estate has *ipso facto* ceased, by operation of the condition, it can not be revived without a new grant." (4 *Kent's Com.* 128.) Under this view of the case, it is clear that the plaintiffs' right ceased with the expiration of the four years.

3dly. We think it an erroneous construction of the resolution in question to regard it as a lease at all. It is argued that this

Parmeloo v. Oswego and Syracuse Railroad Co.

resolution should be regarded as a lease because the commissioners never executed leases, but speak by resolution. It seems to us that this is a conclusive reason why we should not hold it to be a lease. The legislature well knew the difference between a lease and a resolution. They had already provided that lots for the manufacture of fine salt, and a certain class of lots for the manufacture of coarse salt, should be leased; and had provided very specific regulations as to the conditions of such leases. (See 1 R. S. 257, §§ 31 to 36, 39.) But in relation to the lands in question they merely directed the commissioners of the land office "*to set apart*" so much as they deemed reasonable to the petitioners for the purpose of manufacturing coarse salt under the conditions already stated. This is neither a conveyance nor a lease. It is merely a *license* to occupy the lands of the state for a certain purpose, provided certain conditions are complied with. As to so much of the lands thus set apart as the occupants had covered with erections at the end of four years, the resolution becomes a *continuing license*; but as to the residue, the license, by the very terms of the resolution, ceases and becomes inoperative. It has not a single feature of a lease. It conveys no estate, nor does it purport to do so. It contains no covenants. There is no lessee, who is bound to do or not to do any act. If it were a lease, it doubtless would demise the entire location. In that event, whether the condition were held to be either precedent or subsequent, on the failure to comply with it, the applicant would lose the whole of the premises covered by the lease, with all the works erected thereon. We have already seen that under the provisions of the act no such consequence can follow. The rights of the plaintiffs under the act and the resolutions are peculiar, and *sui generis*. They have the right to use the lands set apart, for the *single purpose* of erecting thereon works for the manufacture of coarse salt, and for no other. And this right ceases, as to all the lands not so occupied at the expiration of four years. This we think is the fair reading of the statute and of the resolution founded on it. It follows, that the plaintiff had no legal or equitable right to occupy the land in question in this suit for any purpose what-

Parmele v. Oswego and Syracuse Railroad Co.

ever at the time when the defendants took possession of it; and that they were by consequence intruders and trespassers on the lands of the state.

4thly. It is hardly necessary to say that, if we are right in the views we have taken of the right of the plaintiffs under the act, there is no force in the suggestion that upon the facts proved the plaintiffs are entitled in equity to be relieved from the forfeiture. In addition to this, the complaint is not framed with the view of obtaining that kind of relief; there is a want of requisite parties to the action; and the facts proved are not sufficient to lay the foundation for such a claim.

II. The plaintiffs, being intruders on the public lands, claim to recover the possession of the defendants as wrongdoers, upon the ground of a prior possession. (15 *Wend.* 171. 9 *Id.* 223. 7 *Coven.* 639.) It is true that possession is *prima facie* evidence of title, and a prior possession has been held sufficient evidence to entitle a party to recover in ejectment; and Justice Kent said in *Jackson v. Harder*, (4 *John.* 211,) that a mere intruder can not protect himself under an outstanding title in a stranger. It is difficult, however, to see what right the plaintiffs show to the possession of those premises, when the same evidence which they give to prove the existence of their prior possession also shows that it was tortious and without the shadow of any justifiable authority. However this may be, we do not think that the defendants stand in the relation of intruders or wrongdoers.

1st. They have shown a title derived from the state, by letters patent, executed by the proper authorities. Now though this patent be void, the plaintiffs, who are mere strangers and intruders, can not set up its want of validity. It was held, in the case of *Cromelin v. Mintur*, (9 *Ala. Rep.* 594,) that notwithstanding a patent was fraudulently obtained, or had issued in violation of law, and was therefore void, yet that a mere intruder could not set up the invalidity of the patent. And this principle we believe to be sound law. The statute makes every security tainted with usury *absolutely void*; and yet no princi-

Parmelee v. Oswego and Syracuse Railroad Co.

ple is better settled than that a *stranger* can not set up that defence.

2dly. For another reason, the plaintiffs can not set up the want of validity of this patent, in this collateral way. Its validity can only be controverted in a direct proceeding to avoid it, by *scire facias*, or in chancery. And here we desire to take the distinction between a party standing in the position of the plaintiffs without any color of title, and one who has established a title in himself, whose rights are attempted to be subverted through a conveyance emanating from the officers of the government, under the provisions of a statute. We have held, in such a case, in *Varick v. Tallman*, (2 *Barb. S. C. Rep.* 113,) that the party relying on such a conveyance must prove all the prerequisite steps necessary to confer on the officer the power of sale. But, we say that, as against a party who shows no color of right in himself, and even when he shows a title from the state, of a junior date to that conveyed by letters patent, such letters, under the seal of the state, are conclusive, until they have been repealed. It is only where the letters patent are *void on their face*, by reason of being issued contrary to law, or when the grant is of an estate contrary to law, as against the prohibition of a statute, that such grant will be held void in a collateral proceeding. This is so laid down in 2 *Bl.* 348, 3 *Id.* 260, and was so adjudged by the supreme court of this state in *Jackson v. Lawton*, (10 *John.* 23,) and 6 *Cowen*, 281. In *Jackson v. Lawton*, it was insisted by the defendant's counsel, that a distinction existed between letters patent issued by the commissioners of the land office, in this state, and grants issued by the king, in England. It was said that the commissioners were a board instituted for a special purpose and with limited powers, and that their acts were conclusive only when done pursuant to their powers. But the court, Kent, Ch. J. delivering the opinion, held otherwise, saying that letters patent were a matter of record, and unless they were *void on their face* must be attacked by a direct proceeding in chancery, or by *scire facias*. He says, "the principle has been frequently admitted that the fraud must appear on the face of the patent, to render

Parmelee v. Oswego and Syracuse Railroad Co.

it void in a court of law; and that when the fraud or other defect arises from circumstances dehors the grant, the grant is voidable only by suit." Now, there is nothing on the face of this grant to render it void.

3dly. The plaintiffs assert that the act of April 12, 1848, under a provision of which this patent was issued, applies only to lands unsuitable for the manufacture of salt, and that inasmuch as it is proved by witnesses that the lands in question were not of that character, therefore the patent is void. A conclusive answer to this objection is, that the act authorizes the laying out into lots, &c. and selling "such portions of the Onondaga salt springs reservation as are not occupied for the manufacture of salt, *and which they shall deem unsuited for that purpose.*" The commissioners are made the judges of that fact, and when they have DECIDED, by directing a sale of a given portion of this land, and a purchaser has paid his money into the treasury of the state, and received his patent, can the people alledge that the grant is void, without restoring the purchase price? And if the people can not do this in an action of ejectment, can third persons do it who have no interest whatever in the question? We think not. The evidence that the lands in question are in fact well suited for the manufacture of salt, was not admissible, to prove that the commissioners had *judged erroneously or acted corruptly*, and therefore that the grant was void. If the patent had issued under a mistake of fact, or a false suggestion, it might be repealed on a scire facias, or proceeding in chancery, wherein the purchaser could be put in *statu quo*. But in a collateral proceeding by an ejectment the people would be estopped by the receipt of the defendant's money and their own record of conveyance. No private person could sustain such a suit, either in law or chancery, without restoring the money he had received.

4thly. Another objection to the title of the defendants, under the seventh section of the act of 1848, (*Laws of 1848, p. 468.*) rests on the argument that the title thus obtained was in violation of the 7th section of the 7th article of the constitution of 1846. By the constitution of 1821 the legislature were prohibited from "selling or disposing of the salt springs or the lands

Panmeele v. Oneida and Syracuse Railroad Co.

contiguous thereto and which might be necessary or convenient for their use." (1 R. & 46, art. 7, § 10.) By the present constitution the *prohibition* extends only to the salt springs, but not to *the lands*, except by *implication*. The section reads as follows: "The lands contiguous thereto, and which may be necessary and convenient for the use of the salt springs, may be sold by authority of law, and under the direction of the commissioners of the land office, for the purpose of investing the moneys arising therefrom in other lands alike convenient; but by such sale and purchase, the aggregate quantity of the lands shall not be diminished." Now it is fair to conclude that the power to sell, except as is authorized in this section, is by a necessary implication prohibited. There are, however, several requisites necessary to bring the taking of the land in question within the prohibition of the constitution. (1.) It must be clearly shown that the lands in question are, within the meaning of the constitution, "*contiguous* to the springs and *necessary* and convenient for the use of them." We have no means (so far as the evidence goes) of determining whether the lands in question are within the meaning and intention of the framers of the constitution. The lands in question are situated at a very considerable distance from the springs, and are not "*contiguous*" or "*necessary* for the use of the springs," in a different sense from a considerable territory which is now built up as a part of the city of Syracuse, and which has been sold by authority of laws passed at different times while the constitution of 1821 was in force. (1 R. & 258, § 36. *Laws of 1837*, pp. 93, 143. *Id. of 1839*, pp. 345, 411.) The legislature therefore have not given so wide a construction to the descriptive words employed in the constitution as is now contended for.

(2.) If the construction of these terms should embrace the lands in question, and other lands similarly situated, then the extent of the lands, to which the prohibition extends, would include an area of several miles square. If that be so, it could never be the intention of the framers of the constitution, when they forbade the sale of these lands, to prohibit the appropriation of such parts of them as might be necessary for public highways;

Parmelee v. Oswego and Syracuse Railroad Co.

canals or railroads. It has been decided in this state that railroads are so far public improvements, that the legislature may constitutionally pass acts authorizing the taking of private property necessary for their construction, and that in that respect they stand on the same footing as canals and common highways. (*See Beekman v. The Saratoga and Sch. Railroad Co.* 3 Paige, 45, and *Bloodgood v. The Mohawk and Hudson Railroad Co.* 18 Wend. 9.) It may be, and probably is, a positive advantage to the manufacturers of salt, that these lands are traversed by a canal and a railroad. The facilities for sending the manufactured article to market are thereby greatly increased. An act, therefore, which provides for the taking of such portions of those lands as may be necessary for the construction of a railroad, upon the appraisal and payment of the damages to the state occasioned thereby, is not in conflict with the constitutional prohibition of the sale of these lands. Such an appropriation of the lands is not a sale, within the letter or spirit of the constitution. The seventh section of the act of 1838, then, was constitutional. Under that act, the state, by its officers, on the 3d of June, 1848, received the appraised value of the land taken by the defendants, upon receiving the report of the appraisers who had been appointed to appraise the value of the lands surveyed off to the company by the state engineer and surveyor. The act gave the defendants a right to the possession of the premises so surveyed, appraised and paid for, against the plaintiffs. It undoubtedly appears that there was some irregularity, in the proceedings of the state officers; but none of such a description as would render the rights *void* which the company obtained by the payment of their money and the receipt of it by the treasurer of the state; especially after the subsequent ratification of those acts and the confirmation of the title of the defendants by the commissioners of the land office. I am not saying that the defendants have a perfect title to the land in question. It is not necessary to decide that point. But we mean to say that their title is not *void* by reason of its having had its origin in a violation of the constitution; and we mean to say further, that the company has a right, *as against the*

Mallory *v.* Austin.

state, to occupy the premises in question until such right shall be declared void in some appropriate proceeding; and that such right is paramount to the right derived from a prior unlawful possession by the plaintiffs, and cannot be questioned by them in this suit.

For these reasons the judgment is affirmed.

SAME TERM. *Before the same Justices.*

MALLORY *vs.* AUSTIN.

When a plank road company has erected its toll gates within the distances authorized by law, and has fixed the rates of toll at the several gates at an amount not exceeding the legal rates for the entire distance, and for the distances between the several gates, it may lawfully exact the full toll thus fixed, at a particular gate; notwithstanding the traveller may not have travelled upon the road a distance which, at the established rate per mile actually travelled, would amount to such toll.

THIS was an appeal by the plaintiff, Mallory, from a judgment of the county court of Oneida county, reversing the judgment of a justice of the peace. The defendant was the keeper of a gate on the Northern Plank Road, which commences at Deerfield corners, in Oneida county and extends north to the town of Boonville, a distance of twenty-one miles. There were three gates on this road, and the toll at each gate, prescribed by the board of directors, was ten cents for a vehicle drawn by two animals. The gate kept by the defendant was two miles north of the southern extremity of the road, and one mile one quarter and one chain south of the point where the cross road on which the plaintiff resided meets the plank road. It also appeared that the directors had authorized the defendant to allow all persons coming upon the plank road, through the above mentioned cross road, and travelling towards Utica, to

Mallory *v.* Austin.

pass the gate by paying six cents toll. On the 17th day of May, 1849 the plaintiff passed the gate, travelling southward, and the gate keeper exacted and received of him the sum of six cents for toll, notwithstanding the plaintiff proved to him that he had only travelled on the road one mile one quarter and one chain. Upon this state of facts the appellant brought an action before a justice to recover the penalty for receiving a greater sum for toll than the law authorized, under the provision in the revised statutes adopted and applied to plank roads, by the act of 1847 amending the general plank road act. (*Laws of 1847*, p. 352.) The decision of the justice was in favor of the plaintiff, and the county court reversed the judgment; and this appeal was brought to review that decision.

T. E. Clarke, for the appellant.

Ward Hunt, for the respondent.

By the Court, GRIDLEY J. By the 35th section of the general plank road act (*Laws of 1847*, p. 226) the Northern Plank Road Company was authorized "to erect one or more toll gates upon their road, but not within three miles of each other, and to demand and receive toll, not exceeding one and a half cents per mile for any vehicle drawn by two animals," &c. Under this act, the appellant insists that the company can not receive, in any case, over a cent and a half per mile for the distance actually travelled upon the road, without incurring the penalty prescribed by law for exacting excessive tolls. On the other hand, the respondent contends that when the company have erected their gates within the distances authorized by the law, and have fixed the rates of toll at the several gates, so as not to exceed the legal rates for the entire distance and for the distances between the several gates, they may lawfully exact the full toll thus fixed, at a particular gate, notwithstanding the traveller may not have travelled upon the road a distance which, at the rate of a cent and a half per mile actually travelled, would amount to such toll.

Mallory *v.* Austin.

This proposition, we are constrained to say, has been established by an adjudication of the supreme court, in a case, which in principle can not be distinguished from this. In the case of *Stewart v. Rich*, (1 *Caines*, 182,) a construction was given to a clause contained in the eleventh section of the Cherry Valley Turnpike act, by which the company was authorized to receive the tolls and duties "in the act mentioned," and no more, that is to say, for *any number of miles not less than ten in length of said road*, the following sums of money, *and so in proportion for any greater or lesser distance, viz.*" &c. Recoveries had been had against a toll gatherer, for receiving full toll of persons who had not travelled ten miles on the road. The question before the court was, whether a deduction should not have been made, from the full toll, in proportion to the distance which the traveller had used the road. It was held that no such deduction need be made, but that full toll might lawfully be collected at each gate, irrespective of the distance which the traveller had used the road. "This construction" says Kent, Justice, in delivering the opinion of the court, "is the only one that is reasonable, and it will satisfy the words. The idea that the company must vary the toll at any ten mile gate, on the suggestion that a person has used the road for a less distance than ten miles, is inadmissible because impracticable. The toll gatherer has no means of knowing whether the traveller had rode ten miles or a less distance previous to his arrival at the gate. If this suggestion was allowed to be a ground of reduction of toll, it would open a door to the greatest imposition and fraud upon the company."

Again, in *The People v. The Kingston & Middletown Turnpike Co.* (23 *Wend.* 193) the same doctrine is reiterated, and the principle of the case in *Caines* reaffirmed. The prevailing opinion of the court was delivered by Ch. J. Nelson. His language is very explicit. He says, "it was also said that the demurrer to the five last replications was mainly intended to raise and settle the construction of the act whether the rate of toll shall be in proportion to the *distance actually travelled*, or shall be determined by the *distance between the gates*, as located. The lat-

Mallory *v.* Austin.

ter I am of opinion is clearly the rule intended by the act. (*Laws of 1831*, p. 49, § 5.) By the section referred to, the company may erect the gates at such places as they see fit; but they can demand only '*the following rates of toll for every ten miles, and in the same proportion for a shorter distance*,' &c. This clause refers to the distance between the gates. If that be five miles, the company may demand half toll; if it be two and a half miles, they may demand a quarter toll, and so in proportion." Judge Cowen dissented from a majority of the court in this case, in the general result, but on this particular point he agreed with his brethren. Speaking of the construction claimed by the appellant's counsel as the true one, he says, "such a construction would leave every traveller to estimate his own toll, and make it utterly impracticable for the toll gatherer to perform his duty. It would lay him open to constant imposition." No rule, practicable in its application, can be laid down, by which any traveller can be charged with the exact amount of toll which would be due from him in proportion to the distance actually travelled. In some cases, where the traveller and the place of his residence are known to the toll gatherer, he may judge, with a good degree of probable accuracy, how far the individual has travelled on the road; but in a great majority of cases it would be a mere matter of conjecture; and in no case could he know how far the traveller was intending to travel on the road, short of its actual termination. It will be readily seen that in some cases the traveller will be obliged to pay more than his fair proportion of toll for the distance travelled; while in other cases a traveller may pass over nineteen miles of the road by paying the toll for ten miles, and may also travel any distance between two gates, without paying any toll at all. It was the custom of the old turnpike companies, by equitable arrangements for commutation, and by prescribing reasonably low rates to be charged to those who were known to reside within a moderate distance from their gates, to avoid, as far as was practicable, the injustice of exacting full toll of those who had travelled but a short distance on the road. It is to be hoped

Mallory *v.* Austin.

that the plank road companies will adopt a regulation recommended alike by reason and justice.

As to the particular question involved in this appeal we might stop here, and repose ourselves on the authority of the cases we have cited; for the language of the enactments to which a construction was given in those cases was far more favorable to the interpretation insisted on by the appellants' counsel than is the language of the act under consideration. But the legislature has given a construction to the provision in question entirely incompatible with that claimed by the counsel. By the second section of the act "in relation to plank roads and turnpike roads," (*Laws of 1849*, p. 374, § 2, sub. 5,) it is provided that "persons living within one mile of any gate shall be permitted to pass the same at one half the usual rates of toll," subject to some exceptions mentioned in the act. Now it seems very clear that this must mean one half the amount of toll fixed as the toll to be received at the particular gate. It could not mean one half of the pro rata toll at a cent and a half per mile. That would be three fourths of a cent for one mile, and still more minute fractions of a cent for a less distance.

The counsel for the appellant put some cases of flagrant injustice that might occur under the law, upon the construction which we feel bound to adopt; as for instance, the location of but a single gate on the road, and that near the city of Utica, and an exaction of the toll for the entire route. We do not think such a case likely to occur; but if it should, we know of no remedy for that, and other like cases of injustice, but an application for the removal of the gate; or such an amendment of the act regulating plank roads, as may reach the evil complained of.

'The judgment of the county court must be affirmed, with costs.

SAME TERM. *Before the same Justices.*

EATON *vs.* NORTH and EDMUND.

What is sufficient proof of the materiality of a witness, in a justice's court, upon an application for a commission.

The fact that the party applying for a commission is not a resident of the county where the justice resides, and is absent therefrom, is a sufficient excuse for the making of the affidavit in support of the application, by the attorney, instead of the party.

Where no laches is imputable to a party applying for a commission, and there is nothing to cast suspicion upon the application, he is not bound to state what he expects to prove by the witness whose testimony he seeks to procure.

7 631
78b 555
7b 631
23ap186

APPEAL from the Otsego county court. The action was commenced before a justice of the peace by Eaton, against North and Edmunds, to recover the value of a watch, chain and key, alledged to have been taken and converted by the defendants to their own use. The plaintiff claimed to recover \$37. The defendants' answer was simply a denial of the allegations in the complaint. After issue was joined, the plaintiff, upon notice to the defendants, applied for a commission to be directed to Lodowick Mott, of Parkersburgh, Virginia, to examine Nathaniel Mott, of the same place, as a witness. The affidavit upon which this application was founded, was made by the plaintiff's attorney. He swore that he made the affidavit because the plaintiff was not present, but absent as the deponent believed, at his residence in Oswego county; that a witness not residing in the county of Otsego, nor in an adjoining county, but in the state of Virginia, as the deponent *was informed and believed* to be true, was material in the prosecution of the action, and without whose testimony the plaintiff could not safely proceed to trial. The counsel for the defendants asked the plaintiff's attorney how he knew of Mott's residence being in Virgiua; to which he replied that he was so informed by Mr. Caswell, the deputy postmaster at Schuyler's Lake, who had recently mailed letters to Mott directed to Parkersburgh. The plaintiff's attorney was then asked what facts he expected to prove by Mott; which question he refused to answer. The justice denied the applica-

Eaton *v.* North.

tion for a commission, and proceeded to the trial of the cause. No witnesses were introduced on the part of the defendants. The justice rendered a judgment in favor of the defendants for \$3,40, the costs of suit; and on appeal the county court affirmed the judgment. Whereupon the plaintiff appealed to this court.

J. B. Elwood, for the appellant.

F. Kernan, for the respondents.

By the Court, GRIDLEY, J. On an attentive examination of the affidavit on which the plaintiff moved for a commission, we think that the materiality of the absent witness was positively sworn to. The qualification of the previous allegation by a statement of the information and belief of the person making the affidavit, refers to its immediate antecedent, viz. the residence of the absent witness in Virginia. And so it seems to have been understood at the trial; for the defendants' counsel questioned the witness as to his means of knowledge concerning the statement that the absent witness resided at Parkersburgh, the place mentioned in the notice of motion for the commission; and his answers were satisfactory. A sufficient excuse was contained in the affidavit for the making of it by the attorney, instead of the party. The materiality of the witness was positively sworn to, and inasmuch as the counsel *might* know the fact of materiality, from personal knowledge, we are bound to believe he did. There was no want of probability that the testimony could be obtained on the commission; nor do we see any reasonable ground for refusing the commission. All the requisites of the act (*Laws of 1838*, 232, § 2) were complied with; and the authorities cited to show that the application should have been denied, require nothing but what is fully stated in this affidavit.

The defendants' counsel, after having been informed by the witness of his grounds for believing that the absent witness Mott resided at Parkersburgh, Virginia, proceeded to inquire of him what facts he wished or expected to prove by the absent witness. This question he refused to answer, and thereupon the justice

Wilcox *v.* Randall.

denied the application. He doubtless denied the application because this question was not answered; and in that he erred. No laches was imputable to the plaintiff, and there was nothing to cast suspicion over the application. In such a case, it is settled that the applicant is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. (*See The People v. Vermilya*, 6 *Cowen*, 369.)

There is nothing in the other grounds of error complained of; but on this ground the judgment of the county court and of the justice must be reversed.

Judgment reversed.

SAME TERM. *Before the same Justices.*

WILCOX *vs.* RANDALL.

The word *exchange*, as used in the section of the revised statutes which provides that if a husband seized of an estate of inheritance in lands exchange them for other lands, his widow shall not have dower of both, but shall make her election, within a year, &c. is to receive the same interpretation which is applied to it when used at common law, in reference to that species of conveyance.

In order to deprive the wife of her dower, therefore, in lands conveyed by her husband, or to put her to an election, under the provision of the statute, there must be a mutual grant of equal interests in the respective parcels of land; the one in consideration of the other.

A transfer of a mere equitable interest in 75 acres of land, derived under a lease in perpetuity, for 11 acres of land and \$700 in other property, will not constitute a legal exchange.

When conveyances will not be *presumed*, although there has been a possession for more than thirty years.

THIS action was brought by the plaintiff, Polly Wilcox, widow of Ethan Wilcox, deceased, to recover her dower in eleven acres of land, of which her husband was seized during the coverture. Wilcox conveyed the premises to John Budlong in 1811; the plaintiff not joining in the conveyance. The an-

Wilcox v. Randall.

swer denied the plaintiff's right, and set up by way of defence that on the 13th of April, 1811, Budlong, under whom the defendant claimed, was seised of a certain lot of 75 acres of land situate in Paris, Oneida county, and known as the mill lot; that on that day an agreement was made between him and Wilcox to exchange the 75 acre lot for the 11 acre lot in which dower was claimed; that in pursuance of that agreement Wilcox conveyed the 11 acres to Budlong, and that afterwards Budlong, or his representatives, conveyed the 75 acres to Wilcox; that Wilcox went into possession thereof, and occupied the same until his death; that on such exchange the 11 acres was valued at \$400. The defendant also stated that Wilcox died more than a year before the commencement of this suit, and that, by the failure of the plaintiff to commence a suit to recover her dower within a year after her husband's death, she had elected to take her dower in the 75 acres received in exchange from Budlong, and that she was not entitled to dower in the 11 acres. The plaintiff, by a replication, took issue on the new matter set up in the answer. She denied all knowledge of what lands were bought by Budlong of Wilcox, but admitted that Wilcox bought of Budlong certain premises for a stipulated price, and that he sold to Budlong the lands mentioned in the complaint, as a part of the purchase price of the lands bought of him. That the lands so bought were sold in the lifetime of Wilcox, on a mortgage given by him to raise the purchase money, and the plaintiff never was entitled to dower therein; and the plaintiff insisted on her right of dower in the 11 acres. The case was tried at the Oneida circuit in August, 1849, before H. Gray, justice. The plaintiff proved her husband seised in fee of the 11 acres, during the marriage. It was proved that the 11 acres of land were exchanged by Wilcox with Budlong for the 75 acres owned by the latter, Wilcox, at the same time turning out other property, consisting of watches, a rifle, a clock and bedding, to Budlong, and giving him his notes for from five to seven hundred dollars, as "boot money." A witness testified that he had a conversation with Wilcox in 1843, while he was in possession of the mill property. The defendant offered to give evidence of

Wilcox v. Randall.

the declarations of Wilcox, made on that occasion, to show an exchange between him and Budlong. The plaintiff's counsel objected to this testimony, but the judge admitted the evidence, and the plaintiff excepted. It appeared in evidence that the only title which Budlong had, to the 75 acres, at the time of the exchange, was a lease in perpetuity originally given by Joseph Walker to John Rhoads, reserving an annual rent of \$23, with a clause of re-entry; which lease had been assigned, (or attempted to be assigned,) to Budlong, by an instrument without a seal, executed by Rhoads on the 15th of January, 1797. This lease was assigned to Wilcox, the husband of the plaintiff, on the 8th of April, 1825, by the executors of John Budlong, deceased. It was proved that at the time of the execution of that assignment Wilcox paid the executors \$147, being the balance remaining due for the purchase money of the 75 acres. The defendant produced, on notice, the following written instrument, viz: An indenture purporting to be made the 13th day of April, 1811, between John Budlong of the one part, and Ethan Wilcox and Alfred Wilcox of the other part; whereby in consideration of the sum of \$1200, and of the yearly rents and covenants and conditions thereafter contained, Budlong conveyed to the said Ethan Wilcox and Alfred Wilcox, their heirs and assigns forever, 76 acres of land, more or less, (being the mill property hereinbefore mentioned,) in fee simple, reserving a perpetual rent of \$11,40 per annum, payable to Joseph Walker, the original grantor of the land, with covenants for the payment of the said rent, and a proviso or condition in favor of said Walker, and his heirs and assigns, authorizing them to re-enter for the non-payment of rent after thirty days from the time it became due. This indenture purported to have been signed and sealed by John Budlong and witnessed by William Risley and David Budlong; a part of the seal and part of the signature of John Budlong, were torn from the instrument. This paper was found in John Budlong's desk, with his other papers, at the time of his death; when found, it was in the same condition as when produced. The plaintiff offered to read this instrument in evidence, which was objected to by the defendant's

Wilcox *v.* Randall.

counsel. The court overruled the objection, and the paper was read in evidence. The plaintiff called upon the defendant's counsel to produce any conveyance from Ethan Wilcox, under which the defendant derived title to the 11 acres in which dower was claimed. No conveyance was produced. By consent of the counsel for the respective parties the questions of fact as well as of law were submitted to the court, and the judge decided and found that Ethan Wilcox took an estate in said 75 acres of land which entitled the plaintiff to dower therein: to which the plaintiff excepted. That the plaintiff, not having elected to take dower in the land mentioned in the complaint, by the commencement of proceedings to recover her dower therein within one year after the death of her husband, said Ethan Wilcox, she was barred from recovering dower herein, and that the defendant was entitled to a verdict: to which the plaintiff excepted. And thereupon, under the decision and direction of the judge, the jury found a verdict for the defendant; and the plaintiff, upon a case, moved for a new trial.

T. H. Flandrau, for the appellant. I. The declarations of Ethan Wilcox were improperly admitted in evidence. (1 *Coven & Hill's Notes*, 656, and cases cited. 3 *R. S.* 742, § 16.) (1.) The declarations of the husband can not be given in evidence to defeat the wife's claim to dower. (2.) Especially in this case, where the declarations offered in evidence, were made when the husband was not in possession of the property in which dower is claimed, and long after his possession had ceased. (3.) An exchange in lands, to operate as a bar of dower, must be a valid conveyance at the time it is made, and since the statute of frauds, must be in writing. II. Neither the defendant's answer, nor the proofs, set up a state of facts constituting an exchange of lands, under 1 *R. S.* 740, § 3; or which would put the plaintiff to any election under the provisions of that statute. (1.) The alledged exchange set up in the answer, took place April 13, 1811, at which time Budlong had no estate of freehold in the 75 acre lot. (*Jackson v. Wendell*, 12 *John.* 355. *Jackson v. Wood*, *Id.* 73.) (2.) Budlong made no conveyance dur-

Wilcox v. Randall.

ring his lifetime, and nothing passed by the deed of the executors, dated 8th April, 1825 ; the estate of Budlong, if any, having at his death passed to his heirs at law. III. To constitute an exchange of lands, the following requisites are indispensable, which are wanting in this case. (1.) The estate must be equal. (2.) The word "exchange" must be used ; and "is so individually requisite and appropriated by law to this case, that it can not be supplied by any other word, or expressed by any circumlocution." (3 Bl. Com. 323. 1 Hil. Ab. 76. 2 Id. 310, 311. *Cass v. Thompson*, 1 N. H. Rep. 65. *Co. Lit.* 57. *Lit.* 62.) IV. The proof is clear that no exchange ever took place. The assignment by the executor is the only conveyance Wilcox ever had, and Budlong never had any.

F. Kernan, for the respondent. I. Ethan Wilcox exchanged the lands mentioned in the complaint for the 75 acres of land mentioned in the answer. This is substantially admitted by the pleadings ; it is abundantly established by the evidence ; and having been passed upon as a question of fact, can not be re-reviewed here. By virtue of the exchange, Wilcox became seised of an estate of inheritance in and to the mill and 75 acres of land, and the plaintiff entitled to dower therein. (1 R. S. 740, § 1. 4 Kent, 4, 124. 2 Black. 104, 109. 1 Cruise, 17, § 49. Id. 151, § 19. Id. 149, § 8.) II. The declarations of Ethan Wilcox, while in possession of the 75 acres, were competent. It was admitted by the pleadings, and proved, that Wilcox and Budlong exchanged possession of the two parcels of land. The declarations of Wilcox were competent to characterize that possession, and to show that Wilcox, pursuant to the exchange, possessed the 75 acres as alledged in the answer. (4 John. 230. 3 Id. 499. 14 Wend. 233. 1 Cowen & Hill's Notes, 596, 7.) III. But even if the judge erred in admitting these declarations, this court will not reverse the judgment. The court have the whole of the evidence before them, on a case. Irrespective of these declarations, the answer of the defendant is fully established ; there can not be a doubt but that Wilcox exchanged the 11 for the 75 acres, and took and held the latter by virtue

Wilcox *v.* Randall.

of the title derived by such exchange. It was not necessary to produce the deeds executed on the exchange. After a possession by the respective parties for more than thirty years, deeds are presumed. Indeed the reply does not deny the material allegations of the answer, but sets up new matter in avoidance, and denies the conclusions of law insisted upon by the answer. In such a case, the court will not reverse the judgment even if these declarations were improperly admitted. (4 *Wend.* 458. 12 *Id.* 41, 44. 1 *Hill*, 118.) IV. Wilcox having exchanged the lands mentioned in the complaint for other lands, his widow was not entitled to dower in both; and not having elected to take dower in the land in the complaint mentioned, by bringing her suit therefor within one year after his death, she is barred. (1 *R. S.* 740, § 3. 3 *Id.* 596. 4 *Kent*, 59. 1 *Cruise*, 148, § 3.)

By the Court, GRIDLEY, J. This is a suit for dower, and the defence is that in 1811 the lands in which dower is claimed were *exchanged* by the husband of the plaintiff, with one Budlong under whom the defendant holds, for another farm of 75 acres, and that the defendant did not within one year after the death of her husband make her election to take her dower in the lands given in exchange. It is conceded that she made no election within the year; and it follows, therefore, that if these lands were *exchanged*, within the legal meaning of the term, the plaintiff can not recover. (1 *R. S.* 740, § 3. *Rev. note to this section*, 3 *Id.* 596. 4 *Kent*, 59.)

But the plaintiff denies that an exchange, in the legal sense of the term, took place. An exchange is defined by Blackstone to be "a mutual grant of equal interests, the one in consideration of the other." "The estates exchanged," he adds, "must be equal in quantity; not of *value*, for that is immaterial, but of *interest*; as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like." (2 *Bl. Com.* 323, and *cases cited in the notes*.) The same rule is laid down in 1 *Hil. Abr.* 70, § 2; *Id.* 310, 311. It was suggested on the argument, that the word as used in our statute ought to receive a more

Wilcox v. Randall.

liberal interpretation than that derived from the common law definition. But a reference to the revisers' note before cited shows that it was the object of the framers of the statute to enact the common law rule which is found in *1 Cruise*, 148, § 3, and in *1 Inst.* 31 b. The common law rule must have been adopted with reference to the common law definition of this species of conveyance. We must therefore inquire whether the lands in question were conveyed by the husband of the plaintiff, and the 75 acres were conveyed to him, by that species of conveyance called an exchange.

(1.) There was no exchange of equal interests. It was not even an exchange of land for land. If the rule is to prevail, where half of the consideration, as here, consists of money or personal property, the other half being land, it may also prevail when a thousand acres of land are exchanged for a single acre of land and nine thousand dollars in money. This was not therefore "a mutual grant of equal interests, the one in consideration of the other."

(2.) No *legal* title has ever been conveyed, of the 75 acres. The assignment of John Rhoades to John Budlong of a lease in perpetuity, subject to the condition of paying a stipulated rent, *without seal*, conveyed no legal title. The cases of *Jackson v. Wendell*, (12 John. 355,) and *Jackson v. Wood*, (*Id.* 73,) are conclusive on this point. Again; the title to the premises, if the assignment had conveyed it to John Budlong, descended to his heirs, and could not be conveyed by his executors unless under a legal power contained in the will of John Budlong, of which there is no proof. Nothing therefore but an equitable interest—a mere right to compel a legal conveyance—ever passed to Wilcox. A transfer of a mere equitable interest in 75 acres of land, for 11 acres and \$700 in other property, cannot satisfy the requirements necessary to constitute a legal exchange. Again; it may be added that neither the assignment of the executors of John Budlong to Wilcox, nor the undelivered and cancelled deed of John Budlong, bearing date the 18th of April, 1811, purports to have been made upon an exchange of lands.

A suggestion was made on the argument, that a conveyance

White *v.* Pomeroy

would be presumed after the great lapse of time that has intervened since the exchange of possessions. To this argument there are two answers. (1.) A MUTUAL GRANT at the time, even if presumed, would not be compatible with the evidence, which shows that either \$500 or \$700 in money or property was given, over and above the 11 acres of land. (2.) No such presumption could be entertained till the purchase price was paid, which did not take place, as David Budlong testifies, till April, 1825. Again; John Budlong was then dead, and David was his son and one of his heirs, and he has no knowledge of any other conveyance to Wilcox except the assignment executed by himself and his co-executors. To presume a conveyance, other than this assignment, in the face of this evidence, would be stretching the doctrine of presumptions to a dangerous extent. It is not a case which authorizes a presumption of *two legal conveyances*. Two defective conveyances, one to John Budlong, and one to Wilcox, have been *proved*; and there is no reason to believe that any others were ever executed.

There must be a new trial; costs to abide the event.

SAME TERM. Before the same Justices.

WHITE, appellant, *vs.* POMEROY, respondent.

Where an application is made to a surrogate, for the appointment of a guardian for an infant under fourteen years of age, he should assign a day for the hearing of the application, and direct such notice to be given to the relatives of the infant, residing in the county, as he shall, on due inquiry, think reasonable. And although the act of 1837 requires notice to be served only on such relatives as the surrogate shall direct, this does not dispense with the duty of making the inquiry as to the relatives of the infant, and of directing notice to be given in proper cases.

The discretion vested in the surrogate, is not an arbitrary one; and if it has been erroneously exercised, the error will be corrected on appeal.

Where the appointment of a person as guardian is invalid, his subsequent appointment as administrator of his ward's father, will also be erroneous, if his

White *v.* Pomeroy.

claim to be appointed administrator rests upon the fact that he has been appointed guardian, and is entitled to administer in the right of his ward; and letters have been issued to him, without any citation or notice to relatives having a prior right to the administration.

THIS was an appeal from two orders made by the county judge of the county of Oswego, acting as surrogate, on the 14th day of May last. By the first of those orders, the respondent Pomeroy was appointed guardian of the person and estate of Marshall Whitman, an infant of five years old; and by the second, he was appointed administrator, &c. of Orange Whitman, deceased, the father of the infant. The facts appear in the opinion.

H. A. Foster, for the appellant.

C. P. Kirkland, for the respondent.

By the Court, Gridley, J. As to the order appointing the respondent guardian for the infant. The respondent was the cousin german of the infant, his mother being the sister of the infant's father. The appellant is the maternal uncle of the infant, and resides in the county of Oswego, where the infant himself resides. It was shown by the respondent, in his petition to the surrogate, that his residence was in the county of Ontario, and that the infant had two aunts and three uncles residing in Oswego. The surrogate, immediately, on the same day of the application, without appointing any other day for the hearing, or directing any notice to be given to the relatives of the infant residing in Oswego county, granted an order appointing the applicant the guardian of the person and estate of the infant. This order can not be maintained.

By the fifth section of the act entitled "*Of Guardians and Wards*," it is made the duty of the surrogate to assign a day for the hearing of such an application; and to direct such notice to be given to the relatives of the minor residing in the county as he shall on due inquiry, think reasonable. (2 R. S. 151.) This provision is modified by the act of 1837. (*Laws of*

White *v.* Pomeroy.

1837, *p.* 532, § 44,) so as to require the notice to be served only on such relatives as the surrogate shall direct. This does not dispense with the duty of making the inquiry directed in the revised statutes, and of directing notices in proper cases. It does not appear that any inquiry was made by the surrogate in this case. The answer of the respondent, and the return of the surrogate, are silent on this point. But if he did institute the statutory inquiry, he certainly erred in holding that no notice should be given. He was aware that there were five persons in the county of Oswego who stood in a nearer relation to the infant than the petitioner; three of whom would be entitled to the guardianship before him, unless good cause should be shown to the contrary. Now these relatives were entitled to notice, and no *ex parte* evidence of their unfitness should have been received. It is a most important question, for an infant of the tender age of this ward, who shall have the charge of his education and estate. It depends on the guardian whether he shall be nurtured and trained under such influences and associations as to fit him for a station of respectability and honor in society; or whether he shall be so reared as to be led by bad precept and example to profligacy and ruin. The safeguards, therefore, which the law has thrown around the infant, to prevent an injudicious appointment, must not be disregarded. The discretion vested in the surrogate is not an arbitrary one; and if it have been erroneously exercised, the court will correct the error. (*See Underhill v. Dennis, 9 Paige, 202.*)

II. The order appointing the respondent administrator of the estate of Orange Whitman, deceased, is also erroneous. He was only entitled to be appointed such administrator, by reason of his being a guardian of the infant. (2 *R. S.* *p.* 75, § 33.) In truth the petition presented to the surrogate furnishes decisive evidence that the respondent sought to be made a guardian of the infant, in order that, in the character of such guardian, he might obtain the administration of the estate of the deceased. The appointment of the respondent as guardian being invalid, this appointment as administrator becomes equally so. The daughter of the deceased, (whose age is not stated,) and the

White *v.* Pomeroy.

mother of the respondent, and perhaps other relatives, had a prior right to the administration of the estate of the deceased. It is said by the respondent, that his mother had renounced. But of that fact there is no evidence.

No citation to any other relatives was issued, but letters of administration were issued without notice or inquiry, founded, doubtless, on the letter of guardianship which had just been granted in violation of law. We do not wish to be understood as imputing intentional wrong to the respectable gentleman who administers the office of surrogate in the county of Oswego. All we mean to say is, that we think he acted precipitately, and indiscreetly. He did not sufficiently consider that the surrogate's court is one of limited jurisdiction, and that the observance of all the steps made necessary by the statute are indispensable to the validity of an order or decree, in any case, where the proceeding is *ex parte*.

The only difficulty we perceive, on this branch of the case, is that the appeal is taken from two distinct orders, instead of one; and that the appellant does not show that he has any direct interest authorizing him to appeal. But in the answer of the respondent, no such objection is taken; the question being presented solely upon the validity of the orders which the surrogate has made. We are, therefore, disposed to decide the question upon the merits; leaving all parties to take such proceedings *de novo* before the surrogate, as they shall be advised.

The orders of the surrogate are reversed, with costs, &c.

SAME TERM. *Before the same Justices.*PENNELL and wife *vs.* HINMAN and others.

Where a junior judgment creditor sells the real estate of the judgment debtor, upon his judgment, and becomes the purchaser thereof, and receives a deed from the sheriff, and afterwards pays to the holder of a prior judgment—who has also sold the premises upon his judgment, and bid the same in—the amount of the prior judgment, and takes an assignment of the sheriff's certificate given upon the latter sale, the question whether the transaction between the parties amounts to a *purchase of the sheriff's certificate*, or to a *redemption under the prior judgment*, is one of fact, depending on the intention of the parties.

Where the chain of documentary evidence proving a valid title in the junior judgment creditor under the prior judgment, is complete, the burden of disproving such title, and of establishing the fact that what purports to have been a *purchase* of the sheriff's certificate was in truth a *redemption*, rests upon those assailing such title.

The doctrine of *estoppels in pais* should not be extended, in order to accomplish a fraudulent object.

A party will not be estopped by a declaration made to a mere stranger, where it does not appear that such declaration was ever communicated by him to the party setting up the estoppel, so as to influence his conduct.

IN EQUITY. Bill to foreclose a mortgage. The facts are stated in the opinion of the court.

Geo. F. Comstock, for the plaintiffs.

John Ruger, for the defendants.

By the Court, GRIDLEY, J. The bill in this cause was filed in the late court of chancery, before the vice chancellor of the seventh circuit, to foreclose a mortgage executed by Sampson Jaquith to Henry W. Schroepel, for the purchase price of lot No. 65 in the 16th township of Scriba's patent. The conveyance to Jaquith, and the mortgage executed to Schroepel, bore date on the 13th of April, 1839, and the mortgage, with the collateral bond, was assigned to the plaintiffs on the 16th of July, 1841. Prior to the conveyance by Schroepel to Jaquith, two judgments were recovered against the former, both of which .

Pennell v. Hinman.

became liens on the premises conveyed ; one in favor of the defendant Hinman, docketed on the 7th of January, 1839, and the other in favor of Richard S. Corning, docketed on the 15th of October, 1838. Hinman sold on his judgment and received a sheriff's deed of the premises. Corning also sold on his judgment, and became the purchaser of the lot in question, with several other lots in the same tract. It also appears that S. A. Goodwin recovered a judgment against Schroepel on the 24th of December, 1840, and that Corning purchased the premises on a sale made under this judgment. Hinman claims under his own deed ; and also under a deed executed by the sheriff to him as the assignee of the certificate under Corning's judgment. This title he has conveyed to the defendant Joseph Jaquith, and he is the holder of a mortgage for the purchase money.

The plaintiffs insist that Hinman's judgment had been paid, and that his deed for that reason was fraudulent and void. They also insist that the transaction between Hinman and Corning was not a purchase of the sheriff's certificate ; but a redemption under Corning's judgment ; which was void for the reason that Hinman had no such interest as entitled him to redeem. Upon both those issues much testimony has been taken. It will be necessary, however, to examine but a single point involved in these issues. If Hinman *purchased* Corning's certificate, he has a perfect title under the oldest lien on the premises ; and must of necessity prevail. The important question therefore is, whether Hinman acquired his right to Corning's title, as a *purchaser*, or as a *redeeming owner* under his deed. The written assignment by Corning, bearing date on the 21st of August, 1845, witnessed by Thos. T. Davis, is evidence of a purchase. The chain of documentary evidence, proving a valid title in Hinman, under the Corning judgment, is complete. The burden of disproving this, and of establishing the fact that what purports to have been a purchase of Corning's certificate of sale was in truth a redemption, rests upon the plaintiffs. The transaction, whether it was a purchase or a redemption, took place between Mr. Davis, as the agent of Hinman, on the one part, and Corning on the other, without a witness. Mr. Corning has

Pennell v. Hinman.

not been called to testify by either party ; so that Davis is the only witness competent to speak on this point from positive knowledge, whose testimony throws any light on the case. The hypothesis which the counsel of the plaintiffs sought to establish, was that Davis, on the 14th of August, as the agent of Hinman, paid Corning the sum of \$112,20, for the purpose of redeeming under his sale, and at the same time performed the other acts which by law were necessary to render the redemption perfect. That the act of redemption having been completed on the 14th of the month, the rights of the parties became fixed, so as to leave no power in Corning to assign, or in Hinman to purchase the sheriff's certificate. That the formal assignment, therefore, which bears date on the 21st of August, was utterly void, having been fraudulently contrived and executed, as an after thought, for the purpose of creating false evidence of a sale, at a time when no such contract either was, or could be made, between the parties. With the view of proving this hypothesis to be true, the plaintiffs have produced certain correspondence between Mr. Hinman and one Nathan Soule, who was acting as an assignee of Schroepel for the benefit of creditors, in which the former repeatedly proposed, and finally announced his decided intention to redeem the lot in question, and also a correspondence between Hinman and his agent Davis, by which Davis was explicitly instructed to make the redemption. All this rendered it highly probable that the transaction was in fact a redemption. The plaintiffs, however, go further, and *call Davis himself as a witness*, and it is upon his testimony that the question must be decided. He admits that he was instructed in the letters before mentioned, to make the redemption, and that he produced to Corning on the 14th of August the deed which Hinman had taken of the sheriff on the purchase under his judgment, and that he paid him the sum of \$112,20. But he also says that he had *received other instructions from Hinman*, either verbal or written, by which he was authorized to purchase the certificate instead of redeeming under Corning's judgment. He testifies that he *did not redeem* this lot on the 14th of August, or at any other time ; that he did not on that

Pennell v. Hinman.

day make an absolute payment and appropriation of the \$112-20; but that he left the same with Corning "without making an application of it, until he could hear from Hinman, and that he had a right to withdraw the money." Mr. Davis stated further, that Corning desired him to purchase also certificates for certain other lots which he had bid off on the sale under his judgment against Schroepel, and that the negotiation was left open until he could get authority from Hinman to purchase the other certificates. Hinman finally consented, and on the 26th of August a further purchase was made, and an assignment of other certificates was executed by Corning to Hinman. The witness then proceeds in these words, "On the 14th of August it was concluded between Corning and me that Hinman was to be entitled to the certificates for lot 65 and the east half of 13, if I required it. I told Corning that I would leave the matter in that way, so that if Hinman concluded to take the whole he might do so, or in case Soule should comply with the proposition made that he might have the opportunity of doing so; but the assignment of the certificates for lots 65 and 13 was to be executed in case I required it. I did require it, and the arrangements were accordingly made for 65 and the east half of lot 13, August 21, 1845. Hinman never had any thing to do with Corning personally in regard to this matter, to my knowledge." In a subsequent part of his testimony the witness denies all knowledge of any redemption, and testifies positively that he "did not pay the money under any other arrangement than that Hinman should have an assignment of the certificates. This relates to lot 65 and the east half of 13." Now when it is considered that this witness was called by the plaintiffs themselves, it seems to me that there is no escape from the conclusive character of his testimony. It is true that the missing letters mentioned by Mr. Davis, especially the letter which he thinks contained the instructions to purchase the certificates, and the one addressed by him to Hinman immediately after the transaction of the 14th of August, are not produced. But these letters were all sent to Utica to enable Mr. Thos. E. Clarke to draft the answer of Mr. Hinman, and were never returned to

Pennell v. Hinman.

the witness. It was alledged, and offered to be proved, that they were lost; but the plaintiffs' counsel declined receiving the oath of Mr. Hinman on that point. It is also true, that in the protracted and searching examination of Mr. Davis, it is more than probable he was mistaken in relation to some of the less important particulars concerning which he was questioned. And it may also be mentioned, in this connection, that Mr. Soule testifies that soon after the 14th of August, Davis informed him that Hinman had redeemed the lot under consideration, while Mr. Davis thinks he did not use the word redeemed, but gave him to understand that he had arranged the matter with Corning in relation to that lot. The memory of any person as to the particular word employed in a casual conversation may well be doubted, unless the witness had some especial reason to observe and remember the exact word. Mr. Soule ~~may~~ be right, but it does not appear that, at the time of the conversation, he contemplated the possibility of Hinman's obtaining Corning's title by any other method than a redemption; and if that were so, any analogous expression would convey to his mind the idea of redemption. At all events, the remark of Mr. Davis does not amount to proof of the *fact* of redemption; nor do I think it can be used by the plaintiffs to affect the credit of their own witness. In truth, the counsel of the plaintiffs does not insist that the plaintiffs can impeach Mr. Davis; on the contrary he disclaims the idea of calling in question his veracity. He professes to entertain the highest confidence in his integrity; but he believes that he is laboring under an honest though mistaken belief that he made a purchase instead of a redemption of Corning's title. Now we think that there are insurmountable difficulties in the way of this hypothesis. In the first place, the witness adheres to his first statement concerning the purchase, after his attention had been called to all the circumstances relied on to prove that he was mistaken. In the next place he *knows* how the fact really was. He was a party to the act, and can not be mistaken as to its character. If he had redeemed lot 65, on the 14th of August, and procured a void assignment to be executed to his principal on the 21st of the same month,

Pennell v. Hinman.

he must have done it with a fraudulent intent and a corrupt motive. It is hardly necessary to say that a transaction of this character could not be forgotten by him who perpetrated it. Mr. Davis therefore was not mistaken. He knew whether, as the agent of the defendant, he purchased the certificate of lot No. 65 or not. He has solemnly sworn that he did. And his testimony must be regarded as fatal to the plaintiffs. There was an obvious reason why Hinman, and Davis as his agent, should have allowed the mistaken belief to be entertained that he was about to redeem instead of purchasing the certificate; and this affords a satisfactory solution of the whole difficulty.

A suggestion was made, though it was but slightly dwelt upon in the argument, that Mr. Hinman's letter to Mr. Soule, in which he stated that he should redeem lot 65, should in equity estop him from setting up a purchase of the certificate instead of a redemption. If any person who had a right to redeem, omitted to do so, relying on the supposed invalidity of Hinman's redemption of Corning's judgment, it must have been with the view that the Corning judgment should be satisfied with Hinman's money, but for the benefit of himself. We do not think that the doctrine of estoppel should be *extended* to accomplish such an object. The assurance which is relied on as an estoppel, was made to Mr. Soule. He in no sense represented these plaintiffs, nor does it appear that they were ever informed by Soule of the facts that are supposed to estop the defendant from setting up his defence under Corning's judgment. Soule was the mere assignee of Schroepel, whose duty consisted in appropriating the effects assigned to him to the payment of Schroepel's debts. He was, so far as the question of estoppel is concerned, a stranger, and whatever remarks or declarations Hinman may have made to him, they could not have any influence upon the conduct of the plaintiffs, and they can not therefore avail themselves of these declarations to defeat any defence which Hinman may have been able to establish. (See 8 *Wend.* 483; 3 *Hill*, 221, 2; 2 *Denio*, 621.)

Keyser *v.* Waterbury.

The decree will declare that the title derived by Hinman under the Corning judgment is prior and superior to that conveyed by the deed of Schroepel to S. Jaquith, and will direct the bill to be dismissed with costs.

SARATOGA GENERAL TERM, January, 1850. *Paige, Willard, and Hand*, Justices.

KEYSER *vs.* WATERBURY.

Where a constable has taken property upon an attachment issued by a justice, he is bound to release the same on being served with a certificate that an appeal has been duly made, from the judgment of the justice; in the same manner as if the property had been seized by him upon an execution.

As between the owner of goods and chattels and a constable, replevin will not lie for property in the hands of the latter by virtue of an attachment; unless the property be such as is exempted from execution or attachment.

And the fact that the property is in the possession of another, as the mere agent or depositary of the officer, will not render it any the less in the custody of the law.

DEMURRER to replication. The action was replevin for some cows and sheep. The defendant pleaded that he procured an attachment to be issued by a justice of the peace against the plaintiff as a non-resident of the county, and that the property in question was taken thereon by a constable and placed in the hands of the defendant Waterbury, as the agent of the constable, and for safe keeping. Replication that Waterbury had obtained a judgment against Keyser in that proceeding, and Keyser had duly appealed to the court of common pleas of St. Lawrence county, and had procured the proper certificate of that fact from the justice, and served the same on the constable, and on Waterbury, and demanded the property, which Waterbury refused to give up. To this replication the defendant demurred.

Keyser v. Waterbury.

H. S. Knowles, for the defendant.

James & Brown, for the plaintiff.

By the Court, HAND, J. By the statute, all proceedings on the judgment are suspended by an appeal, (2 R. S. 259, § 192,) and on a certificate that an appeal has been duly made being presented to the constable holding the execution, he shall forthwith release the goods and chattels of the appellant, or his body if he has been taken; and if in jail he is thereupon to be released. (*Id.* § 193.) The attachment requires the officer to take the goods and chattels of the defendant "and safely to keep the same, in order to satisfy any judgment that may be recovered on such attachment." (2 R. S. 230, § 30.) But the officer shall not remove the goods, &c. if a bond is given that the goods shall be produced to satisfy any execution to be issued within six months. (*Id.* § 32.) If taken, the officer is to safely keep such part of the goods as shall be sufficient to satisfy the demand of the plaintiff. In *Seymour v. Dascomb*, (12 Wend. 584,) it was held that a constable who has received the amount of an execution from the party appealing, may, on the appeal being perfected, pay it back. In *Wilson v. Williams*, (18 *Id.* 581,) it was held that the officer was bound to release the property on the presentation of a certificate that a writ of certiorari had been brought, the same as on an appeal. But Nelson, C. J. would not then say how it would be if taken on an attachment. That he considered a *casus omissus* in the statute. But I do not see why the rule should not be the same where goods are held on an attachment, as when held on an execution. In both cases the property is taken and held as security for the demand. It would seem that, even in an attachment suit, if the plaintiff levy his execution before the appeal, the property must be released from the execution by the express provisions of the statute; and there is no good reason why it should be discharged from that, and held on the attachment. Indeed it may be doubted whether the attachment is not wholly *functus officio* as soon as an execution in the same suit is levied on the

Green *v.* Goings.

same property. The appellant gives a bond with sureties, which is supposed to make the appellee safe. This part of the case is clearly with the plaintiff.

But the statute in relation to the action of replevin declares that, "no replevin shall lie at the suit of the defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods and chattels are exempted by law from such execution or attachment," &c. (2 R. S. 522, § 5.) And it has been held that replevin will not lie for property taken on an execution from the debtor's possession. (*Judd v. Fox*, 9 *Cowen*, 259.) "Seized," in that section means taken, not possessed; though if it did, perhaps that would not aid the plaintiff. It is well settled that, as between the execution debtor and the sheriff, replevin will not lie for property in the custody of the law. (*Dunham v. Wyckoff*, 3 *Wend.* 280. *Clark v. Skinner*, 20 *John.* 467. *Hall v. Tuttle*, 2 *Wend.* 475.) As the property was in the possession of the defendant as the mere agent or depositary of the officer, it is none the less in the custody of the law. (*Hayner v. Lucas*, 10 *Pet. Rep.* 400.) There must be judgment for the defendant, with leave to amend on payment of costs.

Judgment for defendant.

SAME TERM. *Before the same Justices.*

S. K. GREEN *vs.* GOINGS.

The record of a judgment in favor of the holder of a draft, against the maker, indorsers and acceptor, is not evidence of presentment, demand and notice, in an action by an indorser against the acceptor.

But in connection with the execution issued thereon, and other proof, it is admissible to show that the indorser had paid the draft, after it was in judgment. In such suit by the indorser against the acceptor, payment of the judgment recorded in the suit brought against the maker, indorsers, and acceptor, and possession of the bill by the plaintiff, are sufficient evidence of ownership.

Green v. Goings

Where the drawee of a bill accepts payable at a particular place, he is considered the principal debtor, liable without demand; a suit, as in other cases of a precedent debt or duty, being a sufficient demand. But he may defeat a suit by showing that he was at the place, ready to pay, according to his acceptance.

THIS suit, commenced in 1845, was brought by the plaintiff as indorser against the defendant as acceptor of a draft, of which the following is a copy, with the indorsements:

"\$450.

Canton, 1st April, 1842.

Sixty-five days after date, please pay to the order of S. K. Green & Brother four hundred and fifty dollars, and charge to the account of yours, &c. value rec'd. ROSWELL GREEN.

To Mr. Charles Goings, Syracuse."

(Indorsed) "S. K. Green & Brother
Simeon D. Moody."

It was accepted on its face thus: "Accepted, payable at Onondaga Co. B'k. Ap. 30, 1842. Charles Goings." The defendant pleaded the general issue. The cause was tried at the St. Lawrence circuit in August, 1848, before Justice Edmonds. The plaintiff offered in evidence an exemplification of the record of a judgment in favor of the Lewis County Bank against the plaintiff and defendant, and R. Green and S. D. Moody, for \$486,16, recovered in the supreme court on this draft, and docketed Oct. 20, 1842. He also offered to prove that an execution was issued thereon, which was satisfied by the plaintiff. The defendant objected to this evidence, because the record of judgment was not between the same parties, nor was it evidence to establish the presentment, demand and notice, necessary to charge the parties to the draft. The court admitted the record, and the defendant excepted.

Barnes, a deputy sheriff of St. Lawrence county, testified that he had the execution, and levied on the property of the plaintiff and S. D. Moody; and that the plaintiff paid it. He further testified that the firm of S. K. Green & Brother consisted of the plaintiff and Lucius Green, who were merchants in St. Lawrence county. Moody testified that he was the last indorser on the draft, and was agent of the Lewis County Bank. That

Green v. Goings.

R. Green applied to him to obtain a discount there, and proposed to give Goings' acceptance. That he required another indorser, and the plaintiff thereupon indorsed the draft as accommodation indorser, and Lucius Green had nothing to do with the matter. That the defendant told him he had the lumber of Roswell Green in his hands, and should have funds for his draft at Syracuse. R. Green proved the defendant's acceptance. It was objected that the original draft should be produced; and the plaintiff's attorney thereupon swore to its loss.

The defendant, on the proofs being closed, moved for a nonsuit, because there was no evidence that the draft was ever presented to the Onondaga County Bank for payment; and again, that Lucius Green should have been a co-plaintiff. This motion was overruled, and the defendant excepted. The judge charged the jury that if they found the plaintiff indorsed the draft personally by the name of S. K. Green & Brother, and not jointly for himself and L. Green, and had paid the draft himself, the defendant, as acceptor, was liable to refund, and the plaintiff was entitled to recover the amount of the draft and interest. The defendant excepted to this charge. The jury found a verdict for the plaintiff for \$586.25. The defendant procured a bill of exceptions to be signed, upon which he moved for a new trial.

B. Perkins, for the defendant.

J. L. Russell, for the plaintiff.

By the Court, HAND, J. I do not think the record of the judgment in favor of the Lewis County Bank against the parties to the draft was evidence of presentment, demand, and notice, for one of the parties to the draft against another. In connection with the execution and other proof it was not admissible to show that the plaintiff had paid the draft after it was in judgment. The 7th section of "An act regulating suits on bills of exchange and promissory notes," passed April 25, 1832, (*Laws of 1832*, p. 489,) declares that "the rights and responsi-

Green v. Goings.

bilities of the several parties to any such bill or note, as between each other, shall remain the same as though this act had not been passed ; saving only the rights of the plaintiff so far as they may have been determined by the judgment." And the statute amending that act seems to have treated the parties as several, throughout. (*Laws of 1835*, p. 248. *And see 1 Hill*, 371 ; 4 *Id.* 35 ; 3 *Barb. S. C. Rep.* 12.) If the record of the judgment be considered as evidence, between the defendants it must be conclusive, and great injustice may be done.

But the defendant was the acceptor ; and from his own admission had the funds of R. Green, for whose benefit the draft was given, in his hands to meet it ; so no damage could be sustained by him. Besides, as between him and the indorser, the acceptor is liable without demand of payment, although the draft was accepted payable at a particular place. The rule fluctuated in England until it was finally settled by the case of *Rowe v. Young*, (2 *B. & B.* 165,) in the house of lords, that when the acceptance was to pay at a particular place, demand at that place must be averred and proved. (*See the opinions of the judges in this case, Id. 180, App.*) This decision was followed by the act 1 and 2 Geo. 4, ch. 7, 8, which made the acceptor liable without demand, unless he accepted payable at a particular place "only and not otherwise or elsewhere." But the rule here seems to be, that where the drawee accepts payable at a particular place, he is considered the principal debtor, liable without demand ; a suit, as in other cases of a precedent debt or duty, being a sufficient demand ; though he may defeat a suit by showing that he was at the place, ready to pay according to his acceptance. (*Foden v. Sharp*, 4 *John.* 183. *Wolcott v. Van Santvoord*, 17 *Id.* 248. *Caldwell v. Cassidy*, 8 *Cowen*, 271. *And see Fullerton v. Bank U. S.* 1 *Peters*, 604 ; *Bank U. S. v. Smith*, 11 *Wheat.* 171 ; *Hartun v. Bishop*, 3 *Wend*, 20 ; *Story on Bills*, § 325, n. 113, 343 ; *Chit. on Bills*, 362, ed. 1842 ; *Fenton v. Gourdry*, 13 *East*, 459.)

Payment of the judgment and possession of the bill by the plaintiff were sufficient evidence of ownership.

One partner can not bind the firm of which he is a member,

Morgan *v.* Avery.

as sureties or accommodation indorsers, without the consent of his copartners. Consequently Lucius Green was not liable on the draft, particularly to those knowing the facts; and had no interest therein.

New trial denied.

NEW-YORK SPECIAL TERM, January, 1850. *Edmonds*, Justice.

MORGAN *vs.* AVERY.

Where an attachment has been issued against a person as an absconding debtor, the proper method of obtaining redress for any irregularity or impropriety in issuing it, is by a special motion to the court, and not by appeal.

On a motion to set aside an attachment, affidavits on the part of the plaintiff may be received, not merely in answer to those on the part of the defendant, but in support of the original application for the attachment.

Under the code of procedure the sufficiency of the affidavits on which an attachment is issued is no longer a jurisdictional question. And it seems that the whole proceeding, the warrant and the affidavits, are amendable in furtherance of justice, and unimportant errors or defects therein may be disregarded.

In order to obtain an attachment under the code, the grounds of the application may be made to appear by the affidavit of the plaintiff himself, as well as of any other person, and may be shown upon information and belief, whenever that may be presented to the judge in such form, that he can act judicially upon it.

Where it is conceded that the defendant has departed the state, all that is required is for the court to be satisfied that his departure was with intent to avoid the service of process. It is not necessary to determine whether he went away with intent to defraud his creditors.

From what circumstances an intention on the part of the defendant to avoid the service of process may be inferred.

THIS was a motion to set aside two attachments which had been issued against the defendant on affidavits alledging that he was indebted to the plaintiff and had departed from the state with intent to defraud his creditors. It appeared that the defendant was a wholesale grocer in the city of New-York, doing business to the amount of about \$300,000 a year. About four years ago he had failed in business, and had compromised with

Morgan v. Avery.

his creditors, and among others with the plaintiffs, who had given him a letter of license which ran out in August, 1849. At that time he was unable to pay the debt which had thus been extended, but borrowed from the plaintiff Morgan \$4000, secured by a hypothecation of sundry collaterals. In October, 1849, he purchased an interest in an English patent right, and on the 4th December he took passage in the steamer which was to sail for Liverpool on the 12th of that month. He sailed accordingly on that day, taking with him £500 only, and leaving his store with the goods which it contained, with his chief clerk, to whom he gave a power of attorney to transact his business in his absence. The next day after he sailed, his clerk called a meeting of his creditors, but before it was held these attachments were issued. In answer to inquiries at his store, his clerk said he had gone east, that they did not know where he had gone, nor when he would return, &c. On the part of the defendant it was averred that he had not departed secretly; having made known his intention to go, to his family, to his clerk, and to those engaged with him in the patent right. On the other hand it appeared that he was owing, at the time of his departure, some \$20,000, a portion of which was past due; that his credit had been much impaired; that he attempted to borrow money the day before he left; that he had borrowed money by means of storage receipts on most of the goods in his store, and had not disclosed to any of his creditors his intention to go abroad; but in conversations had with some of them, within a day or two of his sailing, conveyed the idea of his intention to remain at home as usual.

W. M. Evarts, for the defendant.

D. Lord, for the plaintiff.

EDMONDS, J. The first objection which is to be considered on this motion is that made on the part of the plaintiff, that the defendant can not have redress on a special motion, but only by appeal. The only mode in which an appeal could be available

Morgan v. Avery.

would be by regarding the attachment as an order, and requiring it to be entered with the clerk pursuant to § 350 of the code. This view is sanctioned by § 349, which allows an appeal from an order made by a single judge when it grants or refuses a provisional remedy.

The provisional remedies provided by the code are four; arrest and bail, claim and delivery of personal property, injunction, and attachment. All these remedies may be obtained ex parte, upon partial statements of one side only and without any opportunity in the first instance for the other party to protect himself against their injurious operation. To guard against these injuries, and to prevent remedies intended to be merely provisional from having the effect and operation of final ones, the code contains several enactments.

Thus on an arrest, the party may be discharged from custody by giving bail, or he may apply, on motion, to vacate the order of arrest or reduce the amount of bail. (§§ 186, 204, of Code.) So on a claim and delivery of personal property, the defendant may have the property redelivered to him on giving security. (§ 211.) On injunction, the defendant may apply by special motion to vacate or modify it. (§ 225.) And on an attachment, the defendant may have it discharged, or the property restored to him, on giving security. (§§ 240, 241.)

Thus it will be seen, that in the case of two of the provisional remedies, namely, arrest and injunction, it is provided that redress may be obtained on a special motion; but no such redress is expressly provided in the code in cases of attachment, and claim of personal property; and the question occurs whether it is available.

The arrest and injunction are by order, and not by process; and in respect to them, it might be argued that there is a remedy by appeal. But the claim and delivery of property, and the attachment, are not by order. The former is by a requisition of the party, indorsed on the affidavits, and the latter is by "warrant." So that in respect to them there can be no remedy by appeal; and unless a special motion be available, there is no

Morgan v. Avery.

redress against any irregularity or impropriety in using these two of the provisional remedies.

So far as the attachment is concerned it is process, and over its process the court has necessarily a control, lest it be abused or perverted to purposes of oppression. That control is exercised according to the course and practice of the court, by special motion. It required no provision of the code to confer this power and mode of redress. They are inherent in the court, and unless taken away by statute, must of necessity be resorted to, and rendered available. (*Lenox v. Howland*, 3 *Caines*, 257. *McQueen v. Middletown Man. Co.* 16 *John.* 5.)

The next objection, somewhat preliminary in its character, is that made on the part of the defendant, that the attachment must stand or fall by the original affidavits on which it was obtained, and that the plaintiff's case as then made out, can not be bolstered up by affidavits subsequently obtained, and produced in court. I can find no warrant for this objection, in the statute, and of course nothing to take such a case out of the rule governing all special motions, which permits papers to be read on both sides.

The only kindred practice to that claimed here is, that on a motion to vacate an order to hold to bail, where it has been held that supplementary affidavits will not be received to cure a defect in the original affidavit. That rule grew out of the peculiar practice of the king's bench, which required the affidavit in all cases to be made in the first instance, which only allowed the defendant to move for a discharge on the ground of its insufficiency, and which would not receive counter affidavits to contradict or do away with the effect of the affidavit to hold to bail. The distinction between the two cases is very marked, and particularly so when we advert to the fact that an attachment may issue at any time in the progress of a suit; (§ 227,) so that if the first attachment should be set aside by reason of defective affidavits, a new warrant might immediately issue on new affidavits, which could never be the case in the old practice of arrest on original process. And when it is further considered that that old practice on an arrest is expressly abrogated by the

Morgan v. Avery.

code, (§ 205,) it would be too much to restore it as applicable to attachments.

I therefore consider it good practice to overrule this objection and receive affidavits on the part of the plaintiff, not merely in answer to those on the part of the defendant, but in support of the original application for the attachment. If such application was originally defective, that may influence the question of costs, but need not affect the great question whether by reason of the defendant's absconding, the plaintiffs are entitled to the provisional remedy of an attachment. (*Vide Lenox v. Howland*, 3 *Caines*, 323.)

I ought not, perhaps, to pass from this topic without noticing the cases to which I was referred, in which it was held that an attachment against an absent or absconding debtor under the revised statutes should be set aside if the original affidavits were defective. (18 *Wend.* 611. 4 *Hill*, 598. 7 *Id.* 187.) In those cases, the affidavits were necessary to confer jurisdiction. The proceeding was not in court, but a special one before an officer out of court, whose whole authority was derived from the statute, and could not be enlarged or conferred by implication, and like all cognate cases, could not be amended, but must fail if the foundation on which jurisdiction rested should fail. It is now, however, far otherwise with an attachment. It is now process in a suit, before a court having competent jurisdiction of the subject matter thereof. It is not even original process; for no suit can be commenced by it; and like all other process, must be issued by the clerk in the usual form of writs, though upon an allowance by a judge. The sufficiency of the affidavits on which it may issue, is no longer a jurisdictional question; and it would seem as if the whole proceeding, the warrant and the affidavits, were amendable in furtherance of justice. (*Code*, § 173.) And any error or defect in them which shall not affect substantial right, shall be disregarded by the court in every stage of the action. (§ 176.)

The remedy by this writ is in a measure, novel in our jurisprudence. It never has been until now process in the progress of a suit in the higher courts, and its value to creditors as a

Morgan v. Avery.

mode of enforcing payment, as well as its importance to debtors whose whole property, legal and equitable, may thus be sequestered in the very commencement of a litigation, alike demand that its character should be well understood, and its operation be so guided as to effect the great ends which the statute has in view. Regarding it as process only, not jurisdictional in its character, but as provisional, in the progress of a suit, it will always be within the control of the court, who can mould it to useful purposes, and render it innoxious.

Another consideration was presented to me, which it may not be necessary to determine on this motion, but which it may nevertheless be well to pause a moment to consider.

The statute provides, (§ 229,) that "the attachment may be issued whenever it shall appear by affidavit," &c.; and it is now objected that this means proof, legal proof, not the oath of the party, nor information and belief of any one. It has been so held under the revised statutes, but that arose from the peculiar language of that enactment, which spoke of "proof to the satisfaction of the officer," and of the facts and circumstances to establish the grounds of the application being verified by the affidavits of two disinterested witnesses. (2 R. S. 3, §§ 5, 6.)

The revised laws of 1813, (1 R. L. 157,) required that the concealment or departure should be proved to the satisfaction of the judge by two witnesses. Under that statute it was held, *in re Fitch* (2 Wend. 298,) that an affidavit of the witnesses that they believed that the debtor was a non-resident, was sufficient. And in *Ex parte Haynes*, (18 Wend. 614,) the court say they should not hesitate, under that statute, in receiving the oath of mere belief; and more was required in the case then under consideration, because of the altered language of the statute. In *Smith v. Luce*, (14 Wend. 237,) the court put a similar construction on similar words in the act of 1831, to abolish imprisonment for debt. But in the case in 18 Wendell the court intimate that information and belief, under proper circumstances, might satisfy even the stringent language of the revised statutes. In 14 Wendell they held that if the affidavit had stated positively

Morgan *v.* Avery.

that the party had absconded, or the like, it would be proof on which the officer could act judicially.

Such was the language of our statutes, and such the construction put upon them before the code was enacted. That body of laws, avoiding the strict language before that time used, allows the attachment to issue whenever it shall appear by affidavit, &c. and not requiring, as in the former statutes, that it shall be proved that the affidavits be by disinterested witnesses, nor that they state the facts and circumstances on which the application is founded.

There is a reason for this marked difference of language from that formerly used; because as to all the provisional remedies, it is evidently the intention of the code that they may be obtained merely on the affidavit of the party. Thus the order to arrest may be granted on the affidavit of the plaintiff, or any other person, (§ 181;) a delivery of personal property may be claimed on an affidavit by the plaintiff, or some one on his behalf, (§ 207;) an injunction may be granted on an affidavit of the plaintiff or any other person, (§ 220;) and an attachment may be issued whenever it shall appear by affidavit, &c. (§ 229.)

It seems to me, then, that in order to obtain an attachment, the grounds of the application may appear by the affidavit of the plaintiff himself, as well as of any other person, and upon information and belief whenever that may be presented to the judge in such form that he can act judicially upon it.

I turn now to the main question in the case, namely, whether the defendant has departed from the state with intent to defraud his creditors, or to avoid the service of a summons.

It will be observed that it is not necessary to determine that he has gone away with intent to defraud creditors; it is enough if it was with an intent to avoid the service of a summons. In one respect this statute is different from the revised statutes. Under the latter it was necessary that the debtor should have *secretly* departed. But now such secrecy is not required. If he has departed ever so openly, it will be enough, if the required intent is made out.

The defendant in this case, having confessedly departed the

Morgan v. Avery.

state, all that is required is for the court to be satisfied that his departure was with intent to avoid the service of process. So that if the defendant was on the verge of bankruptcy, and left the state, though openly and publicly, and with a view of transacting business abroad, with a view of having the explosion take place in his absence, and of avoiding the importunity and the proceedings of his creditors, it would seem that the case would come within the statute. It is established in the papers that his departure was not secret, and that he went to Europe on legitimate business, avowing an intention to return in some six weeks. He may not have had an intention to defraud his creditors, and therefore have left all his property behind him except the £500, which was required for his foreign adventure. Still he may have designed to avoid the service of a summons on behalf of his creditors; and if he had such an intention, the attachment can be sustained. I am inclined to think that such intention is justly inferable from his embarrassed position; from his impaired credit; from his attempts to borrow money, so immediately on the eve of his departure; from his confessions of his inability to meet his payments as they became due; from his leaving behind him unpaid debts that were past due; from the pains he seems to have taken not to disclose to any of his creditors his intention to go abroad, though he saw some of them within a day or two of his departure, and after he had taken his passage; from the tenor of his conversations with them, which looked rather to his continuance at home than to an absence abroad; and above all from the fact that within twenty-four hours after he had sailed, his confidential clerk, whom he had left in entire charge of his affairs, called a meeting of his creditors.

It may be that this latter fact, as well as the circumstance that his clerks, when interrogated as to his whereabouts, gave false or equivocal answers, or professed ignorance, may not be justly imputable to him. But I can not overlook the fact that the clerks, though afforded the opportunity on this motion, have given no explanation of either of these matters, but leave the inference to be drawn that their behavior was in obedience to

Morgan v. Avery.

his instructions, and in furtherance of his intention to let his failure happen, and the winding up of his affairs occur in his absence.

I repeat that no inference of an intention to defraud his creditors necessarily flows from the facts of the case; nor is it necessary to cast any such imputation in order to sustain the attachment. If finding himself irrevocably involved, so that his failure must soon happen, he has desired to be out of the way of his creditors at the time it should happen, though he had left all his property behind him, and though he was aiming to get into other business, by means of which he might ultimately retrieve himself, the inference may very properly be drawn that he has departed the state with intent to avoid the service of a summons.

Such, at all events, seems to me to be the highest probability in the case, and I can not, therefore, feel myself warranted in setting aside the attachments as improvidently issued.

The motions must, therefore, be denied. (a)

(a) This case came up on appeal, at the general term in New-York in February, 1850, before Edmonds, P. J. and Edwards and Mitchell, Justices, and the decision at the special term was affirmed. No opinion was written; but in announcing the decision the presiding justice remarked that all the views expressed in the opinion at the special term were concurred in.

INDEX.

A

ABSCONDING DEBTORS.

See ATTACHMENT.

ACCORD AND SATISFACTION.

See EVIDENCE, 3, 4.

ACCOUNT STATED.

See PRACTICE.

ADVERSE POSSESSION.

See POSSESSION, 2, 3, 9.

AFFIDAVIT.

*See ASSESSMENT, &c. 13.
ATTACHMENT, 4, 6, 7, 8.
JUDGMENT, 2.*

AGREEMENT.

1. Where the defendant, at the plaintiff's request, agreed, by parol, that he would go and attend a sale of the plaintiff's farm, under a decree of foreclosure; that he would bid off the premises and take a deed in his own name; that he would give the plaintiff an opportunity to repay him the amount of his bid, and have a reconveyance of the premises; and that

VOL. VII.

84

the plaintiff should have two weeks' notice to pay the amount; and the defendant accordingly bid off the farm, and took a deed in his own name; *Held*, that the agreement was void, as being within the statute of frauds, and would not support an action. *Lathrop v. Hoyt*, 59

2. A lease of lands by parol for a term of one year, to commence *in futuro*, is within the prohibition of the revised statutes respecting fraudulent conveyances and contracts relative to lands, (2 R. S. 134, § 6.) and is therefore void. *Crosswell v. Crane*, 191

3. Such a lease is also void, under the statute of frauds, as being a contract which, by its terms, is not to be performed within one year from the making thereof. *ib*

4. The second section of the title of the revised statutes relative to fraudulent conveyances and contracts respecting goods and chattels (2 R. S. 135) includes also agreements in respect to real estate, which, but for it, would have been valid. *ib*

5. An executory contract for the sale and purchase of land, giving to the purchaser a right to enter and possess the premises until default in the payment of the purchase money, without any time being fixed, and without any reservation of rent, is, as respects the possession, but a *license*, and not a *lease*. *Dolittle v. Eddy*, 74

6. It is not a permanent interest in the land; nor is it an estate; nor does the relation of landlord and tenant exist. *ib*

7. As a general rule, in an action upon a contract, an averment of performance will not be sustained by evidence of a legal excuse for non-performance. *Crandall v. Clark*, 169

8. Where one person agrees to sell and deliver property, and another agrees to receive and pay therefor, in an action by the purchaser, for the non-delivery of the goods, an averment of a readiness and willingness to pay is indispensably necessary; and such averment must be proved, or the plaintiff can not recover. *ib*

9. What classes of canal contracts are within the provisions of the act of May 12, 1847, in relation to the public works, authorizing the insertion of a clause in all contracts made in pursuance of that act, for the speedy and equitable adjustment of all questions relative to the performance, or otherwise, of such contracts. *The People, ex rel. Johnson, v. Benton*, 208

10. A canal contract contained a provision that for the speedy and just settlement of such contract the resident engineer should determine the amount or quantity of the several kinds of work to be paid for, under the contract, and the amount of compensation, and should present an account of the same to the canal commissioners; and that in case either of the parties should consider such final account incorrect, or that it was unjust to either of the parties, arbitrators might be selected, who should investigate the matters complained of, and determine all questions that might arise relating to compensation for work done under such contract. A submission to arbitrators was made, in pursuance of this provision in the contract. *Held*, that by the terms of the contract the matter to be submitted to the arbitrators was the "final account" made out by the engineer; and that the arbitrators, though they might correct the errors of the engineer, could not extend their investigations beyond such 'account,' and take cognizance of independent claims. *ib*

11. *Held also*, that the true interpretation of such submission, and of the power contained in the contract under which the same was made, was that the arbitrators were to determine how much work had been performed; how much of each kind of work; what the compensation should be, for each part and parcel of the said work; and whether the "final account" presented by the engineer was correct, and just to the parties respectively. *ib*

12. As a general rule, the store of the merchant, the shop of the mechanic or manufacturer, and the farm or granary of the farmer, at which commodities sold are deposited or kept, is the place of delivery, when the contract is silent as to the place. *Brownson v. Gleason*, 472

13. But this rule ceases to be applicable when the collateral circumstances indicate a different place. *ib*

14. When the goods are a subject of general commerce, and are purchased in large quantities for reshipment; and the purchaser resides at the place of reshipment, and has, at such place, a storehouse and dock for that purpose; the place of business of the purchaser is ordinarily the place of delivery. *ib*

15. Where a manufacturer of salt at L. executed a writing as follows, "I have this day agreed with B. & C. of Oswego to sell them one boat load of salt per week and deliver the same to them, in good order, equal to 400 bbls. each week from this time to the first of November next," &c.; *Held* that upon the reasonable construction of the agreement, in connection with the surrounding circumstances, the salt was to be delivered at Oswego. *ib*

16. In the year 1841 G. and B. severally applied to the commissioners of the land office to have certain lots at Syracuse set apart to them for the manufacture of coarse salt. Such applications were granted, and resolutions were passed by the commissioners setting apart to the applicants the lands therein described, "for the purpose of erecting works thereon for the manufacture of coarse salt, pursuant to the provisions of Article 4 of Title 10 of Chapter 9 of Part 1 of the Revised Statutes." The 107th section of the article of the revised statutes referred to in the resolutions, provides that the occupant under such a resolution shall have four years within which to complete the works, but that the location shall be void unless the works shall have been commenced, and one tenth of the capital expended within one year; and that "the land, except such parts thereof as shall have works actually erected thereon, shall be lia-

ble to be located by any other individual or company." The 108th section enacts that any part of such location which, at the expiration of the said four years, shall not be actually occupied by manufactoryes, *may be again set apart by the commissioners of the land office to any other person or company, for the erection of such manufactoryes.*" The plaintiffs had succeeded to the rights of G. and B., by assignment. A portion of the lands mentioned in the resolutions were not occupied by manufactoryes, within the four years; but they had been enclosed by the plaintiffs, and improved for agricultural purposes. In 1848, the defendants, having laid the track of their road through the lands in question, under and pursuant to the provisions of the 7th section of the "act to dispose of certain vacant and unoccupied lands belonging to the Onondaga Salt Springs Reservation," &c. passed April 12, 1848, authorizing them to occupy any of the salt lands belonging to the state, for the use of the road, which should be necessary, on appraisement and payment of the value; the lands were appraised at \$739.50, which sum was paid by the defendants into the treasury of the state, and letters patent were issued by the state, to the defendants, for the land taken by them. In an action of ejectment, brought by the plaintiffs for such land, *Held* 1. That the resolutions of the commissioners of the land office were not leases, but agreements; and that regarding them as agreements, they were executory when made, and only became executed *pro tanto*, at the expiration of the four years, so far as the erections had extended over the lands set apart. That as to all the unoccupied lands, such agreements were at all times *executory and permissive* only, or were *licenses* to occupy the lands of the state for a certain purpose, provided certain conditions were complied with. And that as to so much of the lands as the occupant had covered with erections, at the end of four years, the resolutions became a *continuing license*; but as to the residue, the license ceased and became inoperative. 2. That it was a condition precedent that the right should be exercised within the prescribed time, if at all; and that the right not having been so exercised, all interest under the resolutions ceased. And that the plaintiffs' occupation of the premises for agricultural purposes was

a violation of the spirit of the resolutions, and an unlawful usurpation of the property of the state. 3. That the plaintiffs were entitled to be relieved in equity from the forfeiture. 4. That the defendants having a title derived from the state, by letters patent executed by the proper authorities, even though it were void, the plaintiffs, who were mere strangers and intruders, could not set up its want of validity, in an action of ejectment. And that the right of the defendants was paramount to that derived by the plaintiffs from their prior unlawful possession. 5. That the validity of such patent could only be controverted in a direct proceeding to avoid it, by *scire facias*, or in chancery; and could not be attacked in a collateral proceeding. *Parmelee v. Oswego and Syracuse Railroad Co.* 599

See HUSBAND AND WIFE, 1, 2.

PRACTICE, 11, 12.

VENDOR AND PURCHASER, 6, 7, 8, 9.

WILL, 5.

ALTERATION OF INSTRUMENTS.

1. A material alteration of an instrument by the party seeking to enforce the same, made without the consent of the party executing it, will vitiate the paper, and deprive the holder of all rights under it. *Tillotson v. The Clinton and Essex Mutual Ins. Co.* 564
ib
2. Where an alteration is suspicious, and beneficial to the holder of the paper, the presumption is against the party who sets up the paper; and he is required to explain it, before he can recover.

See PRACTICE, 5, 6, 7.

AMENDMENT.

1. The general rule is that a party who has not applied for an amendment until after he has been nonsuited, is too late to ask for a new trial, in addition to an amendment. But where a plaintiff had been nonsuited at the circuit, on the ground that his declaration contained no count adapted to the nature of the case, it appearing that the defendant had not been misled; that the cause had been once tried without any objection having been made; that the statute of limitations had attached; and that such relief would be manifestly in furtherance of justice,

the court allowed the plaintiff to amend his declaration *nunc pro tunc*, and set aside the nonsuit, on the payment of costs. *Balcom v. Woodruff*, 13

2. When, and on what terms, bills for partition may be amended. *Vanderwerker v. Vanderwerker*, 221

APPEAL.

1. An appeal lies to the general term from a judgment entered upon the report of a referee by the direction of a single judge of the court; although the judge did not pass directly upon the amount to which the party recovering was entitled. *Rayner v. Clark*, 581

2. Upon such appeal, not only the correctness of the report and decision of the referee and the judgment entered thereon, is the subject of review, but a prior order made by the judge declaring the answer of the defendants frivolous and directing judgment for the plaintiff, is properly before the court. *ib*

3. For a defect in substance, in the complaint, in not stating facts sufficient to constitute a cause of action, the defendant may appeal to the general term, from a judgment rendered at a special term. *ib*

See ATTACHMENT, 5.
CONSTABLE.

ARBITRATION AND AWARD.

1. A bond of submission to arbitrators was subject to the following condition: "That if the above bounden H. W. S. shall well and truly submit to the decision of O. H. W., M. M., W. D. and J. G., or either three of them who shall act, named, elected, and chosen arbitrators, as well by and on the part and behalf of the said E. O. as of the said H. W. S., between whom a controversy exists, to hear all the proofs and allegations of and concerning, *First*, the amount which has actually been paid upon a certain contract between the said S. of the one part and the said E. O. and J. O. of the other part, of date March 1, 1835, and which in justice should be applied theron; and indorse the amount so found on said contract, and *Second*, of and concerning also all ac-

tions, causes of action, controversies, suits, judgments, debts, dues, and demands, and all other matters of whatsoever name and nature now existing, &c. and determine and settle, and award also, upon said second mentioned matters, &c. so as the award of the said arbitrators be made in writing subscribed by them, or any two of them and attested by a subscribing witness ready to be delivered to the said parties on or before the 1st day of Feb. next, then," &c. *Held* that by the true interpretation of the bond, the parties intended to bind themselves to submit to the award of the arbitrators, of and concerning, *first* the amount that had been paid upon the contract mentioned, at the date of the submission, and *secondly* of and concerning all actions, demands, &c. That both subjects were submitted, to be awarded upon, and that the arbitrators were bound to embrace both in their award. *Oll v. Schroeppel*, 431

2. It is indispensable to the validity of an award made in pursuance of a submission containing the *ita quod* clause, that it should embrace all the subjects submitted. *ib*

3. Although, upon a general submission of all demands, actions, &c. an award is conclusive as to all matters to which the submission extends, whether any particular included in the submission was or was not laid before the arbitrators, or passed upon by them; yet this principle does not extend to a case where a specific subject matter is submitted, in addition to a general submission of all demands. *ib*

4. Where, by a conditional submission, dated December 28, 1842, the parties submitted to arbitrators, among other things, the question how much had been paid upon a certain contract, *at the date of the submission*, and the award merely determined the amount which had been paid upon the contract up to the 1st of January, 1841; wholly omitting to find how much had been paid up to the date of the submission; *Held* that, by expressly limiting their finding to a time previous to the date of the submission, the arbitrators had precluded all ground for a presumption that they intended their award should embrace the intervening period; and that the award was void for the omission to include the whole period. *ib*

5. Held also, that the court could not transfer, in aid of the award, that there were no payments made upon the contract during the time intermediate the 1st of January, 1841, and December 28, 1842, the date of the submission. *ib*

See AGREEMENT, 10, 11.

ASSESSMENT AND ASSESSORS.

1. The only facts necessary to the jurisdiction of assessors are, in reference to real estate, that it be situated in the town or ward, and, in reference to personal property, that the owner be an inhabitant of the town or ward. *Van Rensselaer v. Cotrell*, 127

2. If lands assessed are situated within the town in which the assessors reside, the assessors have jurisdiction of the subject matter. And in making an assessment upon such lands they perform a judicial act, in a manner within the limit of their authority. *ib*

3. However much assessors may have erred in the performance of their duty, yet having jurisdiction of the subject matter, their error may be corrected, in a court of review, but will not render their proceedings void. *ib*

4. When an assessment roll is delivered to the supervisors, though uncorrected errors may appear upon its face, they are not authorized, on that account, to reject or disregard it, but must proceed to annex the tax list, and issue their warrant for its collection. It is equally the duty of the collector to execute the warrant; and both will be protected in the discharge of this duty. *Per Harris, J.* *ib*

5. Occupied lands, which are owned by persons who are not residents of the town or ward where they are situated, are liable to taxation. And the legislature having omitted to prescribe the manner in which the assessment of such lands shall be made, it is proper for the assessors to specify who is the occupant, as well as the name of the owner. *ib*

6. Either would be a sufficient compliance with the law. They may regard the occupant as owner, and assess the lands as owned by a resident of the town; or they may, without no-

ticing the occupant, assess them as lands of a non-resident owner. *ib*

7. The essential thing to be done by assessors, in the discharge of their official duty, is to determine who are to be taxed, and what property is taxable. This is a matter within their jurisdiction. In making the determination they act judicially; and, though they may proceed irregularly, yet, having jurisdiction of the subject matter, their decisions can not be questioned collaterally. *Per Harris, J. Van Rensselaer v. Wilbeck*, 133

8. What provisions of the statute prescribing the duties of assessors, are merely directory in their character. *ib*

9. Those duties which, though required of the assessors, are not of the essence of the thing to be done, are not essential to the validity of the assessment. The certificate of the assessors, required by the 26th section of the statute relative to the assessment of taxes, is thus to be regarded. *ib*

10. The entire want of such certificate, much less the omission of the assessors to adopt the form prescribed in the statute, will not invalidate a tax charged by the board of supervisors upon the persons and property specified in the assessment roll, if the assessment itself is, in all respects, conformable to law. *ib*

11. No mere irregularity in the proceedings of assessors will justify the supervisors in omitting to annex the tax lists to the assessment rolls returned to them. *ib*

12. A failure to comply with the directions of the statute relative to the assessment of lands belonging to non-residents, is but an irregularity in a mere matter of form, in no way affecting the rights of any one, and therefore will not vitiate the assessment. *ib*

13. Requisites of the affidavit, authorized by the 15th section of the statute relating to the assessment of taxes, to be made by a person who seeks to reduce the amount of an assessment upon his personal estate. *ib*

14. On the 13th of May, 1846, the common council of the city of New-York passed an ordinance directing that a bulk-head should be built across Pike

slip on the southerly line of South-street, and the vacant space behind filled with earth. At about the same time the common council passed an ordinance for the making and completion of that part of South-street which lies below Pike slip and Market slip, by building a bulk-head on the southerly line of said street. *Held*, that the building of the bulk-head across Pike slip, and filling the vacant space behind, in pursuance of these ordinances, was to be deemed the filling up of a slip, under section 267 of the act of April 9, 1813; (2 R. L. of 1813, p. 445;) and that the assessment for the expenses of such improvement was properly made under the 269th section of the same act; one third of the amount to be paid by the city, and two thirds by the persons in the vicinity, benefited thereby. And this, notwithstanding the effect of the improvement was to continue South-street. *The Mayor, &c. of New-York v. Whitney*, 485

ASSIGNOR AND ASSIGNEE.

See WITNESS, 3, 4, 5, 6.

ATTACHMENT.

1. Third persons are not estopped by the appointment of trustees under the 62d section of the act concerning attachments against absconding, concealed, and non-resident debtors, from contesting the jurisdiction of the officer, and the consequent validity of the warrant of attachment issued by him. *Decker v. Bryant*, 182

2. And no greater effect, as evidence, can be claimed for the report of the officer entertaining the proceedings, made to the supreme court in pursuance of the 68th section of that act, than is given to the record of the appointment of trustees. *ib*

3. It is not conclusive, on the question of jurisdiction over the case made by the attaching creditors, on their application for the attachment. *ib*

4. What facts are necessary to be alleged, in the affidavits, &c. upon an application for an attachment, under the act concerning absconding, concealed, and non-resident debtors. *ib*

5. Where an attachment has been issued against a person as an absconding debtor, the proper method of obtaining redress for any irregularity or impropriety in issuing it, is by a special motion to the court, and not by appeal. *Morgan v. Avery*, 656

6. On a motion to set aside an attachment, affidavits on the part of the plaintiff may be received, not merely in answer to those on the part of the defendant, but in support of the original application for the attachment. *ib*

7. Under the code of procedure the sufficiency of the affidavits on which an attachment is issued is no longer a jurisdictional question. And it seems that the whole proceeding, the warrant and the affidavits, are amendable in furtherance of justice, and unimportant errors or defects therein may be disregarded. *ib*

8. In order to obtain an attachment under the code, the grounds of the application may be made to appear by the affidavit of the plaintiff himself, as well as of any other person, and may be shown upon information and belief, whenever that may be presented to the judge in such form, that he can act judicially upon it. *ib*

9. Where it is conceded that the defendant has departed the state, all that is required is for the court to be satisfied that his departure was with intent to avoid the service of process. It is not necessary to determine whether he went away with intent to defraud his creditors. *ib*

10. From what circumstances an intention on the part of the defendant to avoid the service of process may be inferred. *ib*

See BOND.
CONSTABLE.
PLEADING, 10, 11.

B

BILLS OF EXCHANGE.

1. To fix the liability of an indorser of an accepted bill, it is necessary that the holder should, at the proper time, present it to the acceptor, or at the place of payment, and demand its

payment. *The Bank of Vergennes v. Cameron,* 143

2. Presentment and demand, as well as due notice of non-payment, are conditions precedent to the liability of the drawer and indorser. *ib*
3. The acceptor has a right to see the bill, before he determines whether he will pay it or not. And if he pays it, he has a right to have it delivered to him, as a voucher in his settlement with the drawer. *ib*
4. The fact of presentment need not appear in the protest, *in verbo*, but the statement in the protest must, *ex vi termini*, import that when the notary made the demand of payment, he had the draft with him, ready to be delivered up in case of payment. *ib*
5. Where a notary states in his certificate of protest, that he went with the draft to the bank at which it was payable, and demanded payment, this will be deemed equivalent to saying that when he made the demand he had the draft with him, and was prepared, in case of payment, to surrender it to the person who should honor the draft on behalf of the acceptor; and the evidence furnished by such certificate is sufficient. *ib*
6. A memorandum at the foot of a draft, made by a notary and signed with his initials, stating the protest, and the mailing of notices directed to the drawer and indorsers, constitutes no part of the official certificate of the notary, and is not legal evidence of the service of notices of non-payment, upon the drawer and indorsers. *ib*
7. Nor is the fact that an indorser, shortly after the draft becomes due, exhibits a notice of protest which he has just taken from the post office, evidence of due notice to the indorser. *ib*
8. The admission, by one of two partners who have indorsed a draft in the name of the firm, that the draft had been duly protested, will not, if made after the dissolution of the partnership, be allowed to have the effect of proving notice, as against the other indorser. *ib*
9. In an action against an indorser of a bill of exchange, he may prove that the bill was discounted for the acceptor, and that the name of the indorser's firm was put upon the same by his copartner, as an accommodation indorsement, without the knowledge or consent of the defendant. *ib*
10. The fact that the drawer has the draft in his hands, with the indorsement of a firm upon it, is sufficient to charge the person discounting the same with notice that it is a mere accommodation indorsement. *ib*
11. If a person discounting a draft is apprised by the circumstances under which the same is presented to him that the name of a copartnership firm indorsed upon it, had not been indorsed in the usual course of business, this is sufficient to impose upon him the necessity of ascertaining, before he receives it, whether the firm name has been put upon it by proper authority. And if he omits to make such inquiry, he takes the draft at the risk of establishing such authority. *ib*
12. If a draft, discounted under such circumstances, is subsequently transferred, in the ordinary course of business, to a bona fide holder for a valuable consideration, without notice, who sues thereon, the defense that it was indorsed in the copartnership name without the consent of the defendant, can not be sustained. *ib*
13. But upon showing, in such an action, that the indorsement was made for the accommodation of the drawer or acceptor, and without the authority of the defendant, and that the person discounting the same was chargeable with notice of those facts, the burden will be thrown upon the plaintiff, to show that he received the draft under circumstances which would shut out the defense. *ib*
14. In a suit by the indorser against the acceptor, payment of the judgment recovered in the suit brought against the maker, indorsers, and acceptor, and possession of the bill by the plaintiff, are sufficient evidence of ownership. *Green v. Goings,* 652
15. Where the drawee of a bill accepts payable at a particular place, he is considered the principal debtor, liable without demand; a suit, as in other cases of a precedent debt or duty, being a sufficient demand. But he may defeat a suit by showing that he was

at the place, ready to pay, according to his acceptance. *ib*

BOND.

- Where an attachment was issued against a non-resident debtor, on affidavits which were insufficient to confer jurisdiction on the officer issuing it, and after a levy made by the sheriff on the property of the debtor, the latter procured its release by executing and delivering a bond with sureties, reciting the issuing of the attachment, and conditioned as required by statute, for the payment of the debt, with interest, costs, &c. the bond was adjudged to be void. *Cadwell v. Colgate*, 253
- Where a suit is brought on such bond, by the creditor against the debtor and his sureties, the defendants are not estopped from setting up the invalidity of such bond, and avail themselves of the ground that the proceedings under which the property was seized, were void. *ib*

See INTEREST, 1, 2, 3.
PLEADING, 10, 11.

BOOKS OF ACCOUNT.

See EVIDENCE, 10 to 14.

C

CASE.

See REFEREE, 3, 4.

CASES OVERRULED, EXPLAIN-
ED, AND COMMENTED ON.

- Retan v. Drew*, (19 Wendell, 304.) overruled. *Hull v. Peters*, 331
- The *dicta* in *Jackson v. Hathaway*, (15 John. 453.) *Holladay v. Marsa*, (3 Wend. 162.) *Gidney v. Earl*, (12 Id. 98.) *Tonawanda Railroad Company v. Munger*, (5 Denio, 255, 264.) and *White v. Scott*, (4 Barb. S. C. Rep. 56.) commented on and explained. *Griffin v. Martin*, 297
- Reynolds v. Lounsbury*, (6 Hill, 534.) distinguished from the present case; *ib*

and the remark of Bronson, J. that "the plaintiff should have alledged that the defendant wrongfully took the property," disapproved. *Childs v. Hart*, 370

- Payne v. Mathews*, (6 Paige, 20) so far as it conflicts with this decision, disapproved. *Kirby v. Carpenter*, 373
- Van Rensselaer v. Livingston*, (12 Wend. 490.) commented upon, and distinguished from the present case. *Wadsworth v. Thomas*, 445

CATTLE.

The owner of a close, through whose defective fences, cattle, lawfully in an adjoining close or the highway, have entered, can not maintain an action against the owner of such cattle, for damages. *Hand, J. dissented*. *Griffin v. Martin*, 297

See CONSTITUTIONAL LAW, 3.
HIGHWAYS, 1, 2.

CERTIFICATE OF CONVICTION.

See EVIDENCE, 17, 18, 19.

CHARGE.

A charge, in order to carry a fee by implication, when the devise is without words of limitation, must be upon the person of the devisee, in respect to the lands devised. *Vanderwerker v. Vanderwerker*, 221

CHARGE TO JURY.

See JUSTICES OF THE PEACE, 1.
PRACTICE, 3.

CODE.

The provisions of the 66th section of the code of 1848 have no application to the 90th section of the code, *it seems*. But if applicable they do not change its construction, or prevent it from applying to a case where the right of action accrued, and the action was commenced, after the code went into operation. *Wadsworth v. Thomas*, 445

COMMISSION TO TAKE TESTIMONY.

1. The objection that an interrogatory, annexed to a commission, is leading, may be made upon the trial, when the answer of the witness is proposed to be read in evidence. *Fleming v. Hollenback*, 271
2. If a direct interrogatory, and the answer of the witness to it, are properly excluded by the court, cross interrogatories, and the answers thereto, which are dependant upon the direct interrogatory, should also be excluded. *ib*
3. Depositions taken under a commission can not be received in evidence unless the return of the commissioners is indorsed upon the commission. It is not a compliance with the statute for the commissioners to make their return upon a separate piece of paper, and annex it to the commission or depositions. *ib*

See JUSTICES OF THE PEACE, 7, 8, 9.

COMMISSIONERS OF EXCISE.

See EXCISE LAW.

COMMISSIONERS OF LOANS.

See CONSTITUTIONAL LAW, 9, 10.

COMMON COUNTS.

See PRACTICE, 8, 9, 10.

CONSPIRACY.

1. To constitute the offence of conspiracy, there must be a conspiracy to cheat and defraud some person of his property. Although there may have been an intention to defraud, yet if the means used could not possibly have that effect, the offence is not complete. *March v. The People*, 391
2. On an indictment against two, for a conspiracy to cheat, the judgment should be against each defendant, severally, and not against them jointly. *ib*

See INDICTMENT, 3.

CONSTABLE.

1. Where a constable has taken property upon an attachment issued by a justice, he is bound to release the same on being served with a certificate that an appeal has been duly made, from the judgment of the justice; in the same manner as if the property had been seized by him upon an execution. *Kyser v. Waterbury*, 650
2. As between the owner of goods and chattels and a constable, replevin will not lie for property in the hands of the latter by virtue of an attachment; unless the property be such as is exempted from execution or attachment. *ib*
3. And the fact that the property is in the possession of another, as the mere agent or depositary of the officer, will not render it any the less in the custody of the law. *ib*

CONSTITUTIONAL LAW.

1. The act of May 13, 1846, to equalize taxation, is not void as being an *ex post facto* law; it not being designed to operate retrospectively. *Le Comte v. Supervisors of Erie Co.* 249
2. A lease for a term of thirty years, executed before that act took effect, is within the purview of the act, and the rents therein reserved are liable to taxation; although, at the passage of the act, the lease had less than twenty-one years to run. *ib*
3. The act of the legislature (1 R. S. 340, 341, § 5, sub. 11) empowering "the electors of each town, at their annual town meeting, to make rules and regulations for ascertaining the sufficiency of all fences in such town; and for the determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways," is not contrary to the constitution of this state. (Art. 1, § 6, of the Constitution of 1846.) *HAND, J.* dissented. *Griiffs v. Martin*, 297
4. Where an act, authorizing the taking of private property for public purposes, provides for a just compensation to the owner, it is not unconstitutional because it omits to make the assessment and payment of damages a con-

dition precedent to an entry upon and occupation of the premises. *Smith v. Helmer*, 416

5. It is sufficient that the act makes provision for compensation to the owner. The assessment and payment of damages need not precede such entry and occupation. *ib*

6. It was not the intention of the framers of the constitution, when they forbade the *sale* of lands contiguous to the salt springs, to prohibit the appropriation of such parts of them as might be necessary for public highways, canals or railroads. *Parmelee v. The Oswego and Syracuse Railroad Co.* 599

7. An act, therefore, which provides for the taking of such portions of those lands as may be necessary for the construction of a railroad, upon the appraisal and payment of the damages to the state, occasioned thereby, is not in conflict with the constitutional prohibition of the sale of such lands. *ib*

8. Such an appropriation of the lands is not a sale, within the letter or spirit of the constitution. *ib*

9. The office of commissioner of loans is a *county office*, within the meaning of section 2 of article 10 of the constitution of 1846. *In the matter of Carpenter*, 30

10. The mode of appointment of commissioners of loans is not provided for in the constitution, except in the same section which declares that such county officers shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. *ib*

11. The power of appointment by the governor and senate, which existed with respect to county officers, under the former constitution, is by necessary implication taken away by the constitution of 1846. *ib*

See STATUTES, 8, 9, 10.

CORPORATION.

1. In an action against a stockholder in the *Rosie Lead Mining Company*, to recover a debt contracted by the company, a judgment previously recovered by the plaintiff, against the corporation, upon the same demand, is *prima facie* evidence of a debt against the defendant; but subject to be impeached for collusion, or mistake. *Moss v. McCullough*, 279

2. With the exception of cases where fraud or mistake has occurred, a judgment against the corporation, or the liquidation of a debt by the officers of the company, is as obligatory upon the individual stockholders, when they are sought to be charged, as it is upon the corporation itself. *ib*

3. A corporation whose business, according to its charter, was "the raising and smelting lead ore or galena," confined itself for several years after the granting of its charter, to *raising* the ore, the *smelting* being performed for them by M. & K. under a contract. In October, 1839, the directors deeming it for the interest of the company to carry on both branches of the business, themselves, purchased of M. & K. their smelting works for \$15,000, for the payment of which, at a future day, the company gave their promissory notes. In an action against a stockholder upon one of those notes; *Held*, that the directors had authority to make such purchase, and to give the notes of the company for the purchase money; and that such notes were valid and binding. *ib*

4. What is sufficient evidence, to be submitted to the jury, in such an action, as to the authority of the directors to make the purchase, and to give the notes of the corporation for the purchase money. *ib*

5. Evidence of the recovery of other judgments against the company, on notes given by its officers, is admissible as persuasive evidence that the officers had authority to give the notes. *ib*

6. If a portion of the consideration of the note sued on, accrued before the defendant was a stockholder, that portion alone should be deducted from the note, and the plaintiff have a judgment for the balance. *ib*

7. A stockholder in an incorporated company, who is liable for the debts of the company to the amount of the

stock held by him, does not stand in the light of a guarantor or surety, but is a principal debtor. *ib*

D

DEBTOR AND CREDITOR.

- Where a debtor makes a fraudulent transfer of his whole property in order to defraud a judgment creditor, he can not, by a mere voluntary assignment of his property and effects to a trustee, for the benefit of all his creditors, prevent an assignee of the judgment creditor from bringing an action in the nature of a bill in equity against the debtor and the purchasers, to subject the property fraudulently transferred, or its proceeds, to the payment of the judgment. *Leach v. Kelsey,* 466
- The right to set aside the fraudulent sale will not pass, by such an assignment, and can not be asserted by the assignee. *ib*
- The assignor would be estopped from asserting his own fraud, in a suit brought by the creditor against the fraudulent vendee; and the title of the assignee, being derivative merely, he takes no claim, by virtue of the assignment, which the assignor could not enforce. *ib*

DECREE.

- The judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject matter thereby determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. *Vail v. Vail,* 226
- But a former decree, to be a good bar, must have been between the same parties, and for the same subject matter. *ib*

DEED.

- Under the act of 1819, requiring that deeds of land sold by order of a surrogate shall set forth, at large, the orders for the sale, and confirming

the sale, and directing the conveyance, it is not necessary to set forth the orders with literal precision. All that the spirit of the act requires is that the deed shall contain the substance of the orders. A mistake which is merely clerical, and can not mislead—such as a transposition of dates—will not vitiate the deed. *Sheldon v. Wright,* 39

- By the execution and delivery of a deed of land, the entire legal interest in the premises becomes vested in the grantee; and if the grantor continues in possession, afterwards, his possession is not that of an owner, but of a tenant of the grantee. *Burhans v. Van Zandt,* 91
- What amounts to a valid delivery of a deed. *Rose v. Rose,* 174
- Whether evidence of other considerations than those enumerated, in a action, is admissible. *Quare.* *ib*
- In grants of water privileges, where the construction is doubtful, that interpretation should be preferred which will give to the grantee a right to an unrestricted, rather than to a limited, use of the quantity granted. *Fisk v. Wilber,* 395
- Where a grant of a water power specifies the quantity of water to be used, and the mills and machinery to be operated thereby, but the grantee is not confined, in terms, to the use of the mills, &c. particularly specified, the grant will not be construed as restricting the grantee, in the use of the water conveyed, to the particular mills and machinery mentioned in the conveyance. *ib*
- If the grantee of a water power is not restricted, by the terms of his grant, in regard to the objects to which the same is to be applied, he may apply such water power to any kinds of mills or machinery which his interest may dictate; even though the grantor may own machinery of the same kind, with which the grantee's will come in competition. *ib*
- No such restriction can be implied from the fact that, at the time of the grant, the parties were tenants in common of the water power, and of the mills propelled thereby. *ib*
- Where the respective rights of persons

owning a water power rest in grant, and not in covenant; the right of each party to use the water not being in terms made a condition of the grant, and there being no provision made for the effect of a forfeiture; it will be held that the parties intended their rights under the deed should be fixed and vested, at the time of delivery, and not liable to fluctuate and vary according to future events. *ib*

DEPOSITIONS.

See COMMISSION TO TAKE TESTIMONY, 3.

DEVISE.

1. A devise of a farm by a testator to his son, in satisfaction of a claim for services, such farm being sufficient in value for that purpose, and an acceptance thereof by the son, will, if the devise be unrevoked, constitute a perfect defense to an action by the son against the devisor's executors, for such services. *Rose v. Rose*, 174
2. But such a devise will be revoked, by a conveyance of the same land to the devisee, by the testator during his lifetime; and the claim of the son for his services will remain unsatisfied; unless it is agreed that the conveyance shall be in lieu of the devise, and in satisfaction of that claim. *ib*

DOWER.

1. The word *exchange*, as used in the section of the revised statutes which provides that if a husband seised of an estate of inheritance in lands exchange them for other lands, his widow shall not have dower of both, but shall make her election, within a year, &c. is to receive the same interpretation which is applied to it when used at common law, in reference to that species of conveyance. *Wilcox v. Randall*, 633
2. In order to deprive the wife of her dower, therefore, in lands conveyed by her husband, or to put her to an election, under the provision of the statute, there must be a mutual grant of equal interests in the respective parcels of land; the one in consideration of the other. *ib*

3. A transfer of a mere equitable interest in 75 acres of land, derived under a lease in perpetuity, for 11 acres of land and \$700 in other property, will not constitute a legal exchange. *ib*

E

ELECTION.

See HUSBAND AND WIFE, 3.

EQUITY.

See JURISDICTION.

ESCROW.

See HUSBAND AND WIFE, 4.

ESTOPPEL.

1. Equitable estoppels, or estoppels *à pais*, growing out of the acts and declarations of the party sought to be estopped, are applied for the prevention of fraud, and only exist to prevent injury, when equity and good conscience require that the party should not be heard to gainsay his acts or declarations, by which another person has been influenced in his conduct. *Martin v. Angell*, 407
2. To create an estoppel which shall preclude a party from alledging the truth, it must appear, 1. That he has made some declaration, or done some act, inconsistent with the truth, with a design to influence the conduct of another; 2. That the party alledging the estoppel was ignorant of the truth, and relied and acted upon the faith of such acts or declarations; 3. That an injury will result to him, if the other party is allowed to gainsay them. *ib*
3. C. entered into a contract with A. & B., by which he agreed to sell and transfer to them, at any time within two years, certain bank stock, at a specified price. Subsequently a conversation was had between C. & A., and others, in which C. informed those present of a proposition made to him by L. to purchase the stock.

A. did not assert the claim of himself and B. upon the stock, under the contract with C., but told C. that he "could not advise him, but that he must exercise his own judgment." *Held* that the omission of A. to assert the claim of himself and B. under the contract, and to give notice to C. that their legal rights would be insisted upon, did not operate as an *equitable estoppel*, which would preclude a suit upon the contract, in the names of A. and B. *ib*

4. *Held also*, that whether the facts proved were evidence of a new agreement between A. and C., rescinding the first, and consenting to a sale of the stock to L., was a question of fact for the jury. *ib*

5. The doctrine of *estoppels in pais* should not be extended, in order to accomplish a fraudulent object. *Pennell v. Hinman*, 644

6. A party will not be estopped by a declaration made to a mere stranger, where it does not appear that such declaration was ever communicated by him to the party setting up the estoppel, so as to influence his conduct. *ib*

See BOND, 2.
LETTERS PATENT, 5.

EVIDENCE.

1. Where a plaintiff, in order to show that a letter, given in evidence, was written by the defendant, proved by the postmaster at the place of the defendant's residence that on the day of the date of the letter in question there was a letter mailed at his office which was sent "eastward;" *Held* that such evidence was inadmissible for the purpose of raising a presumption that the letter thus mailed was the letter given in evidence, and that, being mailed on that day, it was probably the act of the defendant. *Crandall v. Clark*, 169

2. A party, after having introduced evidence, before the jury, on the trial of a cause, can not be permitted to withdraw it, on finding that it does not answer his purpose. Evidence once given, belongs to the cause, and is the common property of all the parties. *Decker v. Bryant*, 182

3. To a declaration in debt on judgment, the defendant pleaded, 1st. accord and satisfaction by the turning out and acceptance of certain goods in the defendant's store, and 2d. that the judgment was rendered on a cognovit containing a condition that the judgment should be satisfied out of certain specified property of the defendant, and no other, and that such property was so applied by means of an execution issued upon the judgment. The plaintiff replied, taking issue upon the first plea. He also replied to the second plea, not denying any of the facts therein stated, in respect to the condition annexed to the cognovit, or the sale of the defendant's property upon the execution, but taking issue on an averment in the plea that on such sale the property sold for \$3000. On demurrer to the replication it was held good, and the cause went to trial on the issues of fact. *Held* that on the trial, evidence of the accord and satisfaction was admissible; it not being competent for the court, at nisi prius, to pass upon the question as to the validity of the plea of accord and satisfaction. *Welch v. Lynch*, 380

4. *Held also*, that the second plea was not a plea of accord and satisfaction, but was a plea that the debt had been levied upon a *s. f. fa.*, and was therefore good. *ib*

5. *Held further*, that upon that plea the amount levied, upon the execution, was material; and that the demurrer was therefore properly overruled. *ib*

6. *Also held* that it was competent for the defendant, on the trial, to give the judgment record and the execution in evidence, for the purpose of proving his plea. *ib*

7. In a suit by a purchaser, against the vendor, for fraud in misrepresenting the boundaries of the land, the judgment record in an action of ejectment brought against the purchaser, by a third person, will not be evidence, upon the question of title between the vendor and purchaser. *Clarke v. Baird*, 64

8. The record of a judgment in favor of the holder of a draft, against the maker, indorsers and acceptor, is not evidence of presentment, demand and notice, in an action by an indorser against the acceptor. *Green v. Goings*, 662

9. But in connection with the execution issued thereon, and other proof, it is admissible to show that the indorser had paid the draft, after it was in judgment. *ib*

10. Books of account should only be received in evidence upon preliminary proof that they contain original entries, made by the party himself; that they are fairly kept; and that the party had no clerk, and had dealings with the person charged. *Larue v. Rowland*, 107

11. These are questions upon which evidence is to be addressed to the court, to enable it to determine whether the books of account shall be received as evidence at all. *ib*

12. So also fraudulent circumstances may be proved, for the purpose of rendering the books incompetent evidence. *ib*

13. A defendant, in order to establish a set-off, after making sufficient preliminary proof, offered in evidence a *day book* and a *ledger*, and upon inspection, it appeared that the entries in the day book were of a date several years anterior to the trial, and that the defendant had another day book, containing entries of a later date, in which the account with the plaintiff was continued. The ledger showed one item posted from this second day book, to the plaintiff's account. No excuse being given for not producing the second day book; *Held* that the other books were not competent evidence, to prove the set-off. *ib*

14. Books of account, to some extent, partake of the nature of documentary evidence. Hence all the books containing entries relating to an account, when relied upon as furnishing evidence to sustain the account, should be produced; in order that the other party may have the benefit of *all* the entries made therein. *ib*

15. In an action by a plank road corporation, against a stockholder, to recover the amount of calls made upon the stock held by him, the books of the corporation are admissible in evidence, to prove the resolutions calling for payment of the several installments upon the subscriptions for stock. *The Hamilton and Deansville Plank Road Company v. Rice*, 158

16. Parol evidence, of the action of commissioners appointed under and in pursuance of an act to provide for the construction and alteration of a highway, in relation to the alteration of the road at a particular place, at a meeting of all the commissioners upon that subject, is admissible; where it does not appear that any record of the proceedings at that meeting was kept, and the statute did not, in terms, require record of the proceedings of the commissioners to be made. *Smith v. Helmner*, 416

17. A certificate of conviction, in the form directed by the statute, and which was filed in the clerk's office within the prescribed time, is competent evidence of the facts stated therein; although it does not contain evidence that the court had obtained jurisdiction over the person of the prisoner. *People v. Powers*, 463

18. Such a certificate, being made evidence, by statute, of the facts contained in it, can not be contradicted by parol evidence showing that there was in fact no trial and conviction. *ib*

19. Yet *it seems* that a party may so far contradict a record of conviction by a court of inferior jurisdiction, as to prove that the court had no jurisdiction of the offence, or of the person of the prisoner. *ib*

EXCHANGE.

See DOWER.

EXCISE LAW.

1. An indictment will lie against commissioners of excise for wilfully and corruptly granting a license to a person to sell spirituous liquors, as an innkeeper, knowing that he is not a man of good moral character, nor a person of sufficient ability to keep a tavern; that he has not the necessary accommodations to entertain travelers; and that a tavern is not absolutely necessary at the place where he proposes to keep a tavern. *People v. Norton*, 477

2. Justices, in granting or refusing licenses under the excise law, do not act solely as judicial officers. They have indeed a discretion to exercise, which the supreme court will not control by mandamus. But their duties

are so plainly defined, that if they wilfully disregard them they are liable to an indictment. *ib*

EXECUTION.

1. An execution, issued by a justice of the peace, may be renewed, on the last day it has to run, so as to retain the lien thereof upon property levied on by the constable, sufficient to satisfy the execution, and which he has on hand, for want of bidders. *Chapman v. Fuller*, 70
2. A judgment does not lose its lien upon real estate, by the suffering of an execution, issued thereon, to lie dormant in the sheriff's hands. *Muir v. Leitch*, 341
3. The doctrine on the subject of dormant executions does not apply to real estate; the lien upon which depends upon the docketing of the judgment, and not upon the execution, or levy. And such lien does not become dormant until the expiration of the statutory limitation of ten years. *ib*

EXECUTORS AND ADMINISTRATORS.

1. Ordinarily, an executor is not liable for money received by his co-executor. But where one executor, having the actual possession of money or securities belonging to the estate, hands over such money or securities to his co-executor, he will only be exempted from liability, upon showing good reason for having done so. *Mesick v. Mesick*, 120
2. Accordingly, where an executor had assets of the testator in his possession, and had given a receipt for them, in which he undertook to collect the same, and apply the proceeds in the manner designated by the testator; and he afterwards voluntarily delivered such assets to his co-executor, without any good reason for so doing; *Held*, that he was answerable for a misapplication of the assets by his co-executor. *ib*
3. And if such receipt, given by the executor for the assets, embraces a debt owing to the testator by the executor himself, the receipt will be held a sol-

emn recognition of the existence of the demand, by him, and he should be charged therewith, by the surrogate, on the final accounting of the executors. *ib*

4. Executors, after having received full commissions on a sum of money directed to be invested by them for the benefit of a legatee, are not entitled to charge five per cent for receiving and paying over the interest moneys, to the legatee, annually. They can only charge one per cent. *Drake v. Price*, 388

See SURROGATE.

F

FENCES.

The owner of a close, through whose defective fences, cattle lawfully in an adjoining close, or the highway, have entered, can not maintain an action against the owner of such cattle, for damages. *HAND*, J. dissented. *Griffin v. Martin*, 297

*See CONSTITUTIONAL LAW, 3.
HIGHWAYS, 1, 2, 3.*

FORFEITURE.

See AGREEMENT, 16.

FRAUDS, STATUTE OF.

See AGREEMENT, 2, 3, 4.

G

GIRDLING TREES.

See INDICTMENT, 1, 2.

GRANT.

See DEED.

GUARANTY.

*See CORPORATION, 7.
PROMISSORY NOTES, 4, 5.*

GUARDIAN AND WARD.

1. An order was made by the court of chancery, appointing M. guardian for certain infants, to take charge of their property and estate, and authorizing such guardian to release, discharge, and cancel a bond and mortgage belonging to them, "upon receiving from J. S. a bond and mortgage upon unencumbered real estate of sufficient value to be ample security," &c. Held, that by this order the power to discharge the bond and mortgage was connected with a condition precedent that the moneys should be first secured upon other property; and that the guardian had no right to discharge the bond and mortgage without first receiving the security mentioned in the order. *Swarthout v. Swarthout*, 354
2. Held also that, by the order of the court, the guardian was constituted a special agent, as respected the discharging of the bond and mortgage, with limited and conditional powers; and that unless his powers were strictly pursued, his acts were not binding upon his principals, the infants. *ib*
3. Held further, that the recording of a discharge, executed by such guardian without his having taken any new security, afforded no protection to subsequent mortgagees; especially where such discharge, on its face, did not show that the security had been given, as required by the order, but on the contrary, recited that the money had been paid to the guardian, on the bond and mortgage. *ib*
4. Under such circumstances subsequent mortgagees, seeking a protection under the registry act, are bound to show that the guardian was properly appointed, and had power to discharge the mortgage, and that his limited powers had been strictly pursued, before the infants can be prejudiced by his acts. *ib*

See SURROGATE, 21 to 24.

H

HIGHWAYS.

1. The act relative to highways and bridges (1 R. S. 515, § 66) providing for the assessment of the damages of

the owner of land through which highways are laid, is to be construed in connection with the act which authorizes the electors of the town to permit cattle, horses and sheep to go at large on the highway. *Griffis v. Martin*, 297

2. The damages assessed to the owner, through whose lands a highway has been laid out, since the revised statutes took effect, must be presumed to be co-extensive with the use to which such road may, by law, be devoted; and, consequently, to cover, not only the easement of a public way, but also such right of pasture by cattle, horses and sheep, as the said statutes authorize the electors, at their annual town meeting, to permit. *ib*
3. A person travelling on a *public* highway, which has become foundries and impassable, has a right to remove enough of the fences in the adjoining close, to enable him to pass around the obstruction, doing no unnecessary injury; but he becomes a trespasser if he tears away other fences, and tramples down the herbage in other parts of the close. *Williams v. Safford*, 319
4. Where in an action of trespass *quod clausum fregit*, the defendant justifies under an act providing for the construction and alteration of a highway, alledging that he did the acts complained of, by the direction of the commissioners named in the act, and for the purpose of altering the road at the place in question, evidence showing that all the commissioners met and conferred together upon the subject matter of the alterations, and assented to them, and conferred upon one of their number authority to execute their determination, and make such alterations, under whose directions and instructions the defendant acted, is sufficient to sustain the defence. *Smith v. Helmer*, 416

See EVIDENCE, 18.
PRIVATE WAYS.

HUSBAND AND WIFE.

1. Where a man, in contemplation of marriage, agrees to make a settlement on his wife, upon his death, in consideration of which she agrees to relinquish her rights in his property

after his decease, and he dies without having made the settlement, the widow is not barred of any rights which she might have asserted if no such agreement had been executed. *Bliss v. Sheldon*, 152

2. She may therefore claim the exempt articles of personal property given to a widow by the statute. *ib*

3. What amounts to evidence of an election by a widow to abide by an antenuptial agreement; and how far such an election, if made, is binding upon her. *ib*

4. Where husband and wife execute a deed, and deposit it as an *escrow*, to be delivered on the execution of a bond and mortgage, the husband's consent to the delivery of the deed to the grantee, without a performance of the condition, will bind the wife. *Ackert v. Pullz*, 386

See MARRIAGE.

I

INDICTMENT.

1. Under an indictment for maliciously cutting and girdling certain fruit trees, described in the indictment as the property of one B., it is sufficient proof of the ownership of the property to show that the premises on which the trees stood were in the possession and occupation of B. at the time of committing the offence. *People v. Horr*, 9

2. And evidence that B. was not the sole owner of the premises in question, but was only one of several joint owners who held the legal title in common, will not amount to a variance between the indictment and the proof. *ib*

3. An indictment for a conspiracy to cheat and defraud, must set forth the particular means intended to be used by the conspirators, to compass the alleged fraud. *March and Guiris v. The People*, 391

See EXCISE LAW.

INFANTS.

1. It was the intention of the legislature, by the statute authorizing the sale of

VOL. VII.

86

lands belonging to infants, to preserve the funds produced from the sale, in the character of real estate; in order that it might go to the representatives of the infant, who would have taken it as real estate. *Foreman v. Foreman*, 215

2. Under that statute, the proceeds of the sale of infants' real estate, are, for all the purposes of distribution, to be regarded as real estate, in case the infant dies before attaining his majority. *Per Mason, J.* *ib*

3. And the statute having impressed such proceeds with the properties of real estate, for the benefit of heirs, its provisions will continue to operate upon the estate, upon the death of the owner, after he becomes of age; in the absence of any act or intent, on his part, changing the character of the property. *ib*

4. Accordingly, where, upon a sale of the real estate of an infant, a bond and mortgage was given by the purchaser, upon the same premises, to secure the purchase money, and the infant died, after he attained his majority, being still the owner of such bond and mortgage, it was held that the moneys secured thereby and which remained unpaid at the time of his death, belonged to his heirs, and must be distributed among them as real estate, according to the statute of descents. *ib*

See GUARDIAN AND WARD.
SURROGATE, 21, 22, 23, 24.

INJUNCTION.

See RAILROADS, 1, 3, 4.

INN-HOLDERS.

See JUSTICES OF THE PEACE, 3, 4.

INSOLVENT DEBTORS.

1. The bare omission, by an insolvent debtor, applying to be discharged under the two-thirds act, to insert the name of a creditor in his schedule of debts, or the misstatement of the amount due any creditor, will not, alone, vitiate the discharge. *Small v. Graves*, 576

2. The omission or misstatement must be intentional, with a view to a "fraudulent concealment." If not intentional it will not be fraudulent. *ib*
3. The fact that a person becomes a petitioning creditor of an insolvent, for the nominal amount of a debt purchased by him, at a discount, rather than for the amount paid by him, will not, *per se*, vitiate the discharge. *ib*
4. The act which will vitiate the discharge must be an act of the insolvent. He must *procure* the creditor to become a petitioner for a larger amount than is in good faith due him; and this must be done in order to obtain a discharge. *ib*
5. Where the petitioning creditor purchased the demand three or four years before the debtor applied for his discharge, and there was no evidence that the creditor did not hold it as a debt against the insolvent, to the full amount, or that the latter had any knowledge of the circumstances attending such purchase, or of the amount paid for the demand; *Held* that the mere fact of the creditor signing the insolvent's petition as a creditor for the full amount of the demand, when he had purchased the same for a less amount, would not avoid the discharge. *ib*

INSURANCE.

1. The holder of a mortgage has an insurable interest in the mortgaged premises. And the consent of the insurers that a policy previously issued to the owners of the property, may be assigned to the holder of the mortgage, will be deemed in the nature of a contract with him, by which he becomes insured, to the amount which the assignment was intended to secure. *Tillou v. The Kingston Mutual Ins. Co.* 570
2. And although the original parties assured may, by a violation of some of the conditions of the policy, after an assignment of the policy for a part of the amount insured, forfeit their rights to the residue, they can not, *it seems*, by any act of theirs, defeat the rights of the assignee, under the policy. *ib*
3. A mere statement, in a notice of alterations, by the assured, that a ma-

chine put up by them upon the premises, is designed "for burning hard coal," will not be considered as a covenant or agreement that it shall be used with hard coal; or as binding the assured not to use other fuel, should it become necessary, and it can be used without increasing the risk. *ib*

4. Where several owners of property are jointly insured, a sale by one of the owners, of his interest in the premises, to the other owners, is not such an *alienation* of the property as will avoid the policy, under a provision in the act under which the insurance company was incorporated, declaring that when any property insured with such company, shall be "alienated by sale or otherwise," the policy shall become void. *ib*

INTEREST.

1. Where a bond and mortgage, bearing date March 18, 1831, were conditioned to pay "the just and full sum of \$1256.50, with interest after the first day of April next, in fourteen equal annual payments on the first day of April of each and every year after the first day of next April;" *Held* that the true reading of the condition was that the obligor should pay \$1256.50 in 14 equal annual instalments, such instalments to be paid on the first day of April in each year, &c. with interest, &c.; the meaning of which was that the interest on each instalment should be paid when the instalment became due, and not before. *Frenck v. Kennedy*, 458
2. When partial payments are made on a bond or other obligation, after the money has become due and payable by the terms of the instrument, the day on which the payment was to be made is to be disregarded, in the computation of interest. The rests are to be made at the times when the payments are *actually* made; unless the payment should fall short of the interest then due, in which case the rest is to be made when the first payment is received, which, taken with the previous smaller ones, in the aggregate, exceeds the amount of interest due at the time. *ib*
3. In the case of an over-payment, which becomes a partial *anti-payment*, with respect to future instal-

ments, the amount of such over-payment should be immediately applied to the principal and interest to become due on the next annual payday; leaving the interest to be computed on the balance. *ib*

4. Upon a promissory note in these words: "For value received I promise to pay M. B. or bearer the sum of \$1000, payable in ten annual instalments, with use, the first payment to become due on the first day of June, 1848," interest is payable on the several instalments as they respectively become due, and not annually on the whole principal sum remaining unpaid. *Bander v. Bander*, 560
5. There is no general principle of law which requires the interest on notes, bonds, or other written contracts for the payment of money, to be paid annually. The time at which it is to be paid must depend upon the agreement of the parties, as expressed in the contract. *ib*

J

JUDGMENT.

1. A judgment does not lose its lien upon real estate, by the suffering of an execution, issued thereon, to lie dormant in the sheriff's hands. *Muir v. Leitch*, 341
2. The affidavit required by the statute (2 R. S. 373, § 60) to be made by a judgment creditor, in order to acquire the title of the original purchaser at a sale of the judgment debtor's real estate upon execution, or to become a purchaser from any other creditor, will not be vitiated by an error in stating the amount due upon the judgment. If the affidavit is made in good faith, and is in proper form, it is all the statute requires. *ib*
3. An agreement made by the assignee of a judgment, with one of the judgment debtors, whereby he postpones the time of payment of the amount due upon such judgment, will not have the effect to postpone the lien thereof, and destroy the same as against other judgments then existing. *ib*
4. If the holder of a judgment and execution takes a mortgage from one of the judgment debtors, for the amount

of the judgment, payable at a distant day, this will not amount to a release of land belonging to another of the judgment debtors from the lien of the judgment and execution. *ib*

5. The fact of a judgment creditor having other security for the debt, besides the judgment, does not, in and of itself, disqualify the judgment from being the foundation of the creditor's right to redeem under the statute, (2 R. S. 373, § 60.)
6. The judgment of a court of competent jurisdiction, directly upon the point, is conclusive by way of plea in bar in another suit, where the same matter is directly in question between the same parties. *Ehle v. Bingham*, 494
7. And if the previous judgment, relied upon as a bar, is set up as such in the notice attached to a plea of the general issue, it will be equally conclusive as if pleaded specially. *ib*
8. And where it appears from an inspection of the record of the judgment in the former suit, that the same matter in issue in the second suit was directly in question in the former suit; and it also appears from the testimony taken on the former trial, that evidence was given, or attempted to be given, in support of the defence then set up, by an examination of the plaintiff's witness, this is sufficient to constitute a bar; although the defendant introduced no witness on his part. *ib*
9. The fact that the proof on the part of the defendant in the former suit was held insufficient to establish the defence set up, is no evidence that the matter in issue in the second suit was not distinctly passed upon in the former suit. *ib*
10. The mere fact that in the former suit another person was joined as a defendant with the plaintiff in the second suit, will not deprive the defendant in the second suit of the benefit of the former judgment, as a bar. *ib*
11. Where there is no question raised, on the second trial, as to the identity of the matters in controversy in the two suits, but the only question is as to the effect which ought to be given to the former judgment, it should not be submitted to the jury to determine. *ib*

whether the matter in issue in the second suit was passed upon in the former. *ib*

12. Where a junior judgment creditor sells the real estate of the judgment debtor upon his judgment, and becomes the purchaser thereof, and receives a deed from the sheriff, and afterwards pays to the holder of a prior judgment—who has also sold the premises upon his judgment, and bid the same in—the amount of the prior judgment, and takes an assignment of the sheriff's certificate given upon the latter sale, the question whether the transaction between the parties amounts to a *purchase of the sheriff's certificate*, or to a *redemption under the prior judgment*, is one of fact, depending on the intention of the parties. *Pennell v. Hinman*, 644

13. Where the chain of documentary evidence proving a valid title in the junior judgment creditor under the prior judgment, is complete, the burden of disproving such title, and of establishing the fact that what purports to have been a *purchase* of the sheriff's certificate was in truth a *redemption*, rests upon those assailing such title. *ib*

See DECREE.

JURISDICTION.

1. Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance. But it is not every case of nuisance which will authorize the exercise of the jurisdiction. *Fisk v. Wilber*, 395

2. It rests upon the principle of a clear and undoubted right to the enjoyment of the subject in question; and will only be exercised in a case of strong and imperious necessity, or where the rights of the party have been established at law. *ib*

3. It is not the peculiar province of a court of equity to construe contracts, and conveyances of water powers, or to ascertain and define the quantity of water granted or reserved thereby. *ib*

4. The principle upon which the jurisdiction of a court of equity rests, in cases of water privileges, arises from

the preventive remedy which it can afford, in shielding a party from great and irreparable injury which may threaten him. But the rights alledged to be infringed or threatened must be clear, definite, and certain, or capable of being clearly ascertained; otherwise the party should be left to his remedy at law. *ib*

See ASSESSMENT AND ASSESSORS, 1, 2, 3. JUSTICES OF THE PEACE, 2, 3, 4, 5. SURROGATE, 1, 2, 3, 5, 6, 12, 13, 14, 15.

JUSTICES OF THE PEACE.

1. A misdirection to the jury, in the charge of a justice of the peace, on a point of law material in the case, is error; and if it may have misled the jury, the common pleas should reverse the judgment. *Chapman v. Fuller*, 70

2. A mere license does not draw the title in question, within the statute in relation to the jurisdiction of justices of the peace. *Dolittle v. Eddy*, 74

3. Under the 6th section of the 4th title of the 2d chapter of the 3d part of the revised statutes, suspending the jurisdiction of justices of the peace, under that title, in case they shall become inn-holders or tavern-keepers, in fact, after their election, and chapter 140 of the laws of 1846, amending that section, a justice of the peace is not disqualified to entertain proceedings against a person for refusing to work upon the road, on the complaint of an overseer of the highways; although such justice was, at the time of his election, and when the proceedings were had, a tavern-keeper. *Rice v. Milks*, 337

4. Those statutes relate, solely, to the civil jurisdiction of justices of the peace under title 4 of the 2d chapter of the 3d part of the revised statutes; and do not interfere with the powers conferred by other statutes. *ib*

5. To give a justice jurisdiction, and to authorize him to render judgment against an absent defendant, there must be a *return* showing *personal service of process*. *Manning v. Johnson*, 457

6. An entry in a justice's docket, as follows, "Sept 1 Sums 2 pers by S. B. Ward Const 11 plif appears" &c. furnishes no evidence of the service of a summons upon the defendant. *ib*
7. What is sufficient proof of the materiality of a witness, in a justice's court, upon an application for a commission. *Eaton v. North*, 631
8. The fact that the party applying for a commission is not a resident of the county where the justice resides, and is absent therefrom, is a sufficient excuse for the making of the affidavit in support of the application, by the attorney, instead of the party. *ib*
9. Where no lachey is imputable to a party applying for a commission, and there is nothing to cast suspicion upon the application, he is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. *ib*

L

LANDLORD AND TENANT.

1. The general rule is that any one who has a temporary interest in land, and who makes additions to it, or improvements upon it, with a view to the better use or enjoyment of it, while such temporary interest continues, may, at any time, before his right of enjoyment expires, rightfully remove such additions and improvements. *Per Harris, J. King v. Wilcomb*, 263
2. If there are any exceptions to this general rule, they are limited, *it seems*, to cases where the removal of the additions or improvements made by the tenant would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession. *ib*
3. In the case of letting of land for the purpose of nurturing trees and plants, until they are ready to be transplanted, in the absence of any express agreement, the interest of the tenant, in the land, for the purpose contemplated by the parties, will be held to continue until that purpose is accomplished. *ib*
4. Accordingly, where trees, belonging to K. & W., composing a partnership

engaged in the nursery business, were planted upon the land of W., one of the partners, by his consent; *held* that the copartnership had a right, as against W., to cultivate the trees until they were prepared for transplanting, and then, from time to time, to remove them, as their business required. *ib*

5. And W. having, after the trees were thus planted, mortgaged the land to B., and it having been sold, under a decree of foreclosure, to H., and neither the mortgagee nor the purchaser being entitled to protection as bona fide purchasers without notice; *held* that K. might enforce his rights against them, to the same extent as he might have done against W., had the title to the land still remained vested in him. *ib*
6. *Held also*, that the trees which had been planted by the partnership upon the land of W. still remained liable for the payment of the debts of the partnership, and for any balance found due to K. upon the final adjustment of the partnership accounts. *ib*

See USE AND OCCUPATION.

LEASE.

1. A lease, although "for a term commencing *in futuro*, passes a present interest in the term, to the lessee. *Croswell v. Crane*, 191
2. The making, signing and tendering a lease to a tenant, by the lessor, is not a leasing or writing, within the statute of frauds, if the lease does not follow the parol contract between the parties, and the lessee refuses to accept the same. *ib*

See AGREEMENT.

LETTERS PATENT.

1. A distinction exists, between a party claiming the possession of land without any color of title, and one who has established a title in himself, whose rights are attempted to be subverted through a conveyance emanating from the officers of the government, under the provision of a statute. *Parmelee v. Oneida and Syracuse Railroad Company*, 599

2. In the latter case, the party relying on such a conveyance, must prove all the previous steps necessary to confer on the officer the power of sale. But as against a party who shows no color of right in himself, and even when he shows a title from the state, of a junior date to that conveyed by letters patent, such letters, under the seal of the state, are conclusive until they have been repealed. *ib*

3. It is only when the letters patent are *void on their face*, by reason of being issued contrary to law, or where the grant is of an estate contrary to law—as against the prohibition of a statute—that such grant will be held void in a collateral proceeding. *ib*

4. By the act of April 12, 1848, authorizing the commissioners of the land office to lay out into lots, and sell "such portions of the Onondaga salt springs reservation as are not occupied for the manufacture of salt, and which they shall deem unsuited for that purpose, the commissioners are made the judges of the character of the lands; and when they have decided upon that question, by directing a sale of a specified portion of such lands, and a purchaser has paid his money into the treasury and received his patent, the people can not, in an action of ejectment, alledge that the grant is void, without restoring the purchase money. Nor can third persons do it, who have no interest in the question. *id*

5. In a collateral proceeding by an ejectment, the people would, under such circumstances, be estopped, by the receipt of the purchase money, and their own record of conveyance. And no private person could sustain such a suit, either in law or chancery, without restoring the money he had received. *Per GRIDLEY, J.* *ib*

6. Where the commissioners of the land office have directed a sale of a portion of the lands in the salt springs reservation, and a patent has been issued to the purchaser, evidence that such lands were in fact well suited for the manufacture of salt, is not admissible, to prove that the commissioners have *judged erroneously, or acted corruptly*, and that therefore the grant is void. *ib*

See AGREEMENT.

LICENSE.

See AGREEMENT, 5.

JUSTICES OF THE PEACE, 2.
VENDOR AND PURCHASER, 7, 8.

LIEN.

1. Finding property, sunk in the channel of a river, and saving and restoring it to the owner, is to be regarded as the ordinary case of finding the lost property of another and incurring labor and expense in replacing it in his possession. The finder has no lien for salvage, either at common law or by statute. *Baker v. Hoag*, 113

2. Yet the finder may, by the *agreement* of the owner, become entitled to a lien upon the property, for his labor and expenses in rescuing it. *ib*

3. Thus, if the owner of property lost has offered to any person who should find and restore it, a reasonable compensation for his trouble and expense, and a person, relying upon such promise, undertakes to secure the property, and does in fact rescue it, and is ready to deliver it to the owner, upon being paid for his labor and expenses, he is entitled to receive his compensation before he parts with the possession of the property. *ib*

4. The party performing such services upon property, at the request of the owner, becomes a bailee for hire, and as such has a lien upon the thing itself, for the amount of his compensation. *ib*

*See EXECUTION.
JUDGMENT.*

LIMITATION OF ESTATES.

See WILL, 4, 5.

LIMITATIONS, STATUTE OF.

A promise, made since the code of 1848 took effect, to pay a debt which was barred by the statute of limitations before the code went into operation, will not revive the cause of action, unless such promise be in writing, subscribed by the party to be charged thereby. *Wadsworth v. Thomas*, 445

M

MARRIAGE.

Effect of a marriage contracted in France, under the *dotal system*, upon the rights of the husband in the property of the wife, in case of his surviving her. *Vail v. Vail*, 226

MORTGAGE.

1. W., one of two mortgagors, by an arrangement with P., the other, assumed the payment of the mortgage debt, and thereupon executed a new mortgage upon the same and other premises to C. the holder of the original mortgage, which new mortgage was given to secure an individual debt of W. and also the balance due upon the joint mortgage. The joint mortgage was not extinguished, but was kept alive as a collateral security to the second mortgage. W. subsequently assigned his property to assignees, for the benefit of his creditors. The assignees advertised the mortgaged premises for sale, and sold it free from incumbrances, M. becoming a purchaser of a portion thereof. By an arrangement between M. and C. and the assignees, the sum due upon the second mortgage was then secured by M. to C., the owner thereof, which security C. received in payment of the new mortgage, and received the amount to the assignees. C. then assigned the original mortgage to M. On a bill by M. to foreclose the original mortgage, *Held*, 1. That the arrangement between M., C. and the assignees, for securing to C. the payment of the second mortgage, amounted to a *payment and satisfaction* of that mortgage. 2. That by the payment of the amount due upon the second mortgage, the original mortgage was substantially paid to C. and satisfied, and became *functus officio*; and that C. had no power to transfer it, as a subsisting security, so as to authorize M., the assignee, to file a bill to foreclose it. *McGiven v. Wheelock*, 23

2. Although equity will sometimes keep alive a mortgage which has been substantially satisfied, yet, whenever this is done, it is for the advancement of justice, and never to aid in the perpetration of a fraud through the forms of law. *Per GRIDLEY, J.* ib

*See GUARDIAN AND WARD.
INSURANCE.*

N

NEW TRIAL.

1. A new trial should never be granted on the ground that the verdict is against the weight of evidence, unless the verdict is clearly against evidence. *Fleming v. Hollenback*, 271
2. In general, after a jury has passed upon conflicting evidence, the court will not interfere with their verdict, on the ground of its being against the weight of evidence. ib
3. A new trial will not be granted, on account of newly discovered evidence, if the evidence is only material to impeach or contradict witnesses sworn on the former trial; nor where the evidence is merely cumulative. ib
4. Nor will it be granted upon the affidavit of a person whose testimony is impeached, by the opposing affidavits; or upon his testimony, taken in connection with the plaintiff's affidavit, showing his materiality. ib
5. Neither will a new trial be granted for the purpose of affording a party an opportunity to introduce as a witness, a person thus impeached. ib
6. The want of recollection of a fact, which by due attention the party might have remembered, is not a ground for granting a new trial. ib

See REFEREE, 5.

NOTICE.

See BILLS OF EXCHANGE, 2, 7, 12.

NUISANCE.

See JURISDICTION, 1, 2.
RAILROADS, 1, 3.

O

ONONDAGA SALT SPRINGS
RESERVATION.

See AGREEMENT, 16.
CONSTITUTIONAL LAW, 6, 7, 8.
LETTERS PATENT, 4, 5, 6.

ONUS PROBANDI.

See JUDGMENT, 13.
PRACTICE, 11.

OPINIONS OF WITNESSES.

1. A witness can not be allowed to give his opinion as to the amount of damages sustained by a party, in consequence of a mill lying still. But if, in answer to a question as to his opinion, the witness only states facts, error will not lie. *Dolittle v. Eddy*, 74
2. On a question as to the mental capacity of the grantor of a deed, the opinion of an intimate acquaintance, not a medical man, as to the condition of the grantor's mind, is *competent* when connected with facts and circumstances within his knowledge, and disclosed by him in his testimony, as the foundation of his opinion. *Hand, J.* dissented. *Culver v. Haslam*, 314
3. The value and force of the opinion depend on the general intelligence of the witness; the grounds on which it is based; the opportunities he has had for accurate or full observation; and his entire freedom from interest and bias. *ib*
4. Other cases where opinions are admissible, stated and explained. *ib*
5. The *general rule* is that witnesses must speak to *facts*, and that mere *opinions* are inadmissible. *ib*

ORDER.

See POWER, 3, 4, 5.

P

PARTIES.

See PARTITION.

PARTITION.

1. Who are necessary parties to a bill for a partition? *Vanderwerker v. Vanderwerker*, 221
2. When, and on what terms, bills for partition may be suspended. *ib*

PARTNERSHIP.

1. Property belonging to a copartnership is not liable for the debts of the individual members of the firm, until the debts of the firm have all been paid. *Leitch v. Carr*, 341

See LANDLORD AND TENANT, 4, 5, 6.
SURROGATE, 18, 19, 20.

PAYMENT.

See MORTGAGE.

PLANK ROADS.

1. It is no objection to the validity of a subscription to the capital stock of a plank road company that it was made upon a separate paper, which only a portion of the stockholders had subscribed; there having been several similar papers used, in lieu of the books required by the act to be opened in different places for subscriptions. *The Hamilton and Deansville Plank Road Co. v. Rice*, 157
2. Nor is it any objection to the validity of such a subscription, or to the right of the company subsequently organized to maintain an action upon it, that at the time it was made, there was no company in existence. *ib*
3. All the cases which have held subscriptions of stock void are based either upon the supposed want of necessary parties to the agreement; of a sufficient consideration to uphold it; or of a sufficient promise expressed in it. *Per Gridley, J.* *ib*
4. In the case of moneys subscribed for charitable purposes—embracing donations for religious and literary institutions—it has been held that there is no necessity of a personal, pecuniary, benefit to be derived by the subscriber. But in the case of a manufacturing, or plank road, or turnpike, or money corporation, the rule is different. The advantage to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and when the agreement secures that advantage to the subscriber, the objection of a want of consideration can not be made, with success. *ib*

5. Where an agreement, by which the parties thereto promise to take specified portions of stock in a proposed plank road company, not only bears upon its face the evidence of a consideration, founded on the pecuniary advantage of membership, but also upon the mutual promises of the several subscribers, such mutual promises constitute the consideration. And if the promise is to pay the subscriptions, to the corporation to be there-after organized, the fact that the promise is to pay a third party, can not be successfully urged in defense to an action by the company, against a subscriber, to collect the calls upon his stock. *ib*

6. Although an agreement, to take stock in a plank road company proposed to be organized under the general plank road act, contemplates a company whose capital stock shall be a specified sum, a subscription to the full amount named is not a condition precedent to the right of the company to recover upon such agreement. *ib*

7. And where a subscriber agreed to become a member of a proposed company, as soon as the amount of stock required by the plank road act should be subscribed, and to pay the amount of his subscription when the company should be organized; *Held* that as soon as stock to the amount of \$500 for every mile of the road was subscribed, and five per cent paid in, and the company organized, he was liable to be sued by the company for the installments due upon his subscription. *ib*

8. A subscription to the articles of association of a plank road company is not an act indispensable to membership in the company. *ib*

9. A subscription to any legal and valid instrument, by which a party engages to become a member of a company, when organized, and to pay a given sum, which is to be a part of the capital stock, followed up by an acceptance of a certificate for the stock, will make such subscriber a member of the corporation. *ib*

10. The acceptance of a stock certificate is a waiver of any informality that may have intervened, short of an absolute defect of jurisdiction. *ib*

11. And such acceptance of a certificate will lay a foundation for a recovery against the subscriber, by the company, for the amount of the stock subscribed, under a count for money paid. *ib*

12. When a *deviation* of the site of a plank road from the route prescribed in the articles of association, will be considered allowable, under a fair interpretation of the word "*near*," and as being within the discretion of the company. *ib*

13. When a plank road company has erected its toll gates within the distances authorized by law, and has fixed the rates of toll at the several gates at an amount not exceeding the legal rates for the entire distance, and for the distances between the several gates, it may lawfully exact the full toll thus fixed, at a particular gate; notwithstanding the traveller may not have travelled upon the road a distance which, at the established rate per mile actually travelled, would amount to such toll. *Mallory v. Austin*, 696

PLEADING.

1. General rules.

1. Although the forms of pleading previously in use are not now applicable, particularly as to the classification of actions, yet the manner of stating the claim or defense, as required by the code, with that exception, and that of certain formal parts, still remains. The pleader may use his own language; but the pleading must contain the necessary matter, and it must be stated in an intelligible, issuable form, capable of trial. *Per Hand, J. Boyce v. Brown*, 80

2. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts; nor arguments; nor inferences; nor matter of law only. *Per Hand, J.* *ib*

3. Nor should pleadings be hypothetical; nor in the alternative; nor destitute of truth and certainty. *Per Hand, J.* *ib*

4. As a general rule, a pleading, to be good by the settled principles of pleading as modified by the code, must

state the facts constituting a legal cause of action, or ground of defense. And these should be set forth in a plain, direct, definite, certain, and traversable manner, and according to their legal effect. *ib*

5. Any number of facts constituting one cause of action, or one defense, may be combined; but each cause of action, and each defense, should be stated separately, so as to be capable of trial. *ib*

6. Under the present system, it is intended to confine the pleadings to a simple statement of facts. Neither the evidence by which the facts alledged are to be established, nor the legal conclusions to be derived from such facts, can properly be stated. *Per* HARRIS, J. *Russell v. Clapp*, 482

2. Declaration, or complaint.

7. A declaration in replevin, in the *cepit*, must show a wrongful taking. But it is sufficient to alledge that the defendant took the property of the plaintiff, and unjustly detains the same. Such an allegation imports a tortious taking. *Childs v. Hart*, 370

8. If a complaint does not state facts sufficient to constitute a cause of action, the defect will not be waived by the omission of the defendant to demur, for that cause. *Rayner v. Clark*, 531

9. But for such a defect in substance, in the complaint, the defendant may appeal from the judgment, to the general term. *ib*

10. In an action upon a bond given upon the arrest of a party upon an attachment issued for a contempt of court, the plaintiff should state and show, in his complaint, his connection with, and relation to, the attachment proceedings, and how, and to what extent, he was aggrieved by the acts of the defendant. *ib*

11. The order of the court, for the prosecution of such a bond, only operates as an assignment to the aggrieved party; and the fact that the person bringing the action is the aggrieved party must be averred in the complaint, and proved upon the trial. *ib*

3. Plea, or answer.

12. A plea in bar, containing matter in abatement, is bad on general demurrer. *Stone v. Miller*, 308

13. A plea alledging the pendency of a former suit, commenced by the defendant against the plaintiff, in a *plea of trespass on the case*, in which the present plaintiff had set off the same identical demand sued on, in the second suit, is demurrable. *ib*

14. Requisites of an answer, under the code of 1848. *Boyce v. Brown*, 80

15. Section 129 of the code of 1848 (corresponding with § 150 of the amended code,) is a statutory inhibition against duplicity, in stating two defenses together. Each defense, or ground of defense, must be separately stated. And this, *it seems*, applies to more than one defense to the same cause of action, as well as to different defenses to different causes of action. *ib*

16. Method of pleading a right of way. *ib*

17. A party having a private way, can not justify going *extra viam*, because the road is impassable. *ib*

18. A plaintiff, by going to trial upon the answer of the defendant, admits it to be true, so far as the matter is set out issuably. But that admission does not aid a defect of substance, or prevent the plaintiff from taking advantage of it, upon the trial. *ib*

19. If a good title be defectively set out, *it seems* the plaintiff can not, under the 204th section of the code, make the objection on the trial. But where the title itself, as set out, is defective, or where in truth none is set out, the case is different. *ib*

20. An answer which alleges that "the plaintiff who prosecutes the action is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted," is bad on demurrer, for not stating the *facts* upon which the defendant relies, to sustain his allegation that the plaintiff has no right to sue. *Russell v. Clapp*, 483

4. *Demurrer.*

21. A demurrer, in a suit by a receiver, alleging that it does not appear that the plaintiff had any title to the notes sued on, is insufficient, under the code of 1848, to raise the question as to the plaintiff's right to sue as receiver. *White v. Low,* 204

qualification of this rule is that his possession must not have been taken under circumstances which preclude him from disputing the title of the party claiming. *ib*

8. The qualification of the rule has its foundation in the law of estoppel, which will not allow a man to do what, in honesty and good conscience, he ought not to do. *Per HARRIS, J.* *ib*

9. But where a person enters under circumstances which constitute his possession, in its very inception, an adverse possession; and his claim is, from the beginning, hostile to that of persons claiming in remainder and reversion, and he enters, not in subordination to their right, but in defiance of it, there is nothing to impose upon him any obligation to protect the title of the remaindermen and reversioners, or to create a fiduciary relation between him and them. *ib*

10. If, therefore, while he is thus in possession, the premises are sold for the payment of an assessment, which is an incumbrance upon the premises, superior to the rights of either party, and the premises are bid off by a third person, the tenant in possession may purchase the same from him, and take a conveyance thereof, and thus acquire the title, for his own exclusive benefit. *ib*

POWER.

4. A party in possession of land, claiming it as his own, under color of title in fee, is permitted to quiet such title by obtaining a conveyance of an adverse claim, without abandoning his previous claim of title. *ib*

1. The interest which will authorize the execution of a power, after the death of the principal, must be an interest in the thing itself, which is the subject of the power, and not in the proceeds or avail of such thing. *Houghtaling v. Martin,* 412

5. But a person who acquired his possession in such a manner as to owe allegiance to the reversioners can not set up an outstanding title purchased in by him, to defeat their rights. *ib*

2. Where there is merely a power given to a creditor to receive a debt, expressly for the purpose of liquidating the claim of the creditor, but unaccompanied by an actual assignment of the debt, or by any security to which the power might have been ancillary, it is revoked by the death of the principal. *ib*

6. A possession acquired in subserviency to the title of the reversioners, can not be defended, as against them, by asserting a new title subsequently acquired. *ib*

3. But where a person pays or advances money to another, and takes an order upon a third person, as a security for the sum so paid or advanced, to that amount the order will operate to transfer the fund, and will become a

7. The general principle is, that one in possession may purchase in an outstanding title for the purpose of strengthening his own. The only

power coupled with an interest, which will survive the drawer. *ib*

4. And the fact that the drawer, in giving the order is acting as administrator, does not alter the principle. *ib*

5. But if the holder of such order, after the death of the drawer pays money to a creditor of the drawer, upon the faith of such order as a security, he does it without authority, and in his own wrong. *ib*

PRACTICE.

1. A plaintiff, by going to trial upon the answer of the defendant, admits it to be true, so far as the matter is set out issuably. But that admission does not aid a defect of substance, or prevent the plaintiff from taking advantage of it upon the trial. *Boyce v. Brown*, 80

2. If a good title be defectively set out, it seems the plaintiff can not, under the 204th section of the code, make the objection on the trial. But where the title itself, as set out, is defective, or where in truth none is set out, the case is different. *ib*

3. A direction to a jury that in determining whether a letter given in evidence is genuine, they may assume certain facts stated in it as true, and then infer, from the nature of those facts, that they could only have been known by the defendant, and therefore that the defendant must have been the author of the letter, is erroneous. *Crandall v. Clark*, 169

4. A jury can not rightfully assume, without proof, the truth of any statement in a letter which is challenged as a forgery, and when the issue before the jury is whether it is a forgery or not. *ib*

5. It is always a question for the court, to decide, whether a paper is proper to be read in evidence to the jury. *Tillou v. The Clinton and Essex Mutual Ins. Co.* 564

6. The reason of this rule is most emphatically applicable to the case of an altered or mutilated instrument, where the alteration is of such a character that the law pronounces the paper absolutely void, until explained. *ib*

7. But where, in such a case, the plaintiff offers evidence which affords a *prima facie* explanation of the mutilation; or the fact of mutilation comes out on the part of the defence, after the plaintiff has made out his case, the case should be submitted to the jury. *ib*

8. A note made by two persons, and signed by one of them as "surety," is inadmissible in evidence under the common counts, in an action brought against both makers. *Balcon v. Woodruff*, 13

9. A promissory note is only *prima facie* evidence of money lent, or had and received, by the party sought to be charged; and therefore where it is apparent from the face of the note that no money was in fact received by such party, the note will not sustain the common counts. *ib*

10. The word "surety," appended to the name of one of the makers of a note, is not inconsistent with the idea that money was received by the other makers; but it does repel all presumption that the *surety* received it. And therefore, as against him, the note furnishes no evidence of money either lent to, or received by, the party, so as to support the common counts. *ib*

11. The plaintiff, on the 20th of August, 1845, received from the defendant \$10,000 on account, but gave the defendant no credit for \$1500, parcel of that sum, although the plaintiff made use of the \$1500 soon after it was received. In an action by the plaintiff to recover the balance of an account claimed to be due from the defendant; *Held* that the *onus* of accounting for the \$1500, and explaining how it was applied, lay upon the plaintiff, notwithstanding an account current of the dealings between the parties produced by the plaintiff on the trial, which was silent as to the \$1500, was received in evidence by consent of the defendant's counsel, "subject, however, to explanation by witnesses on either side;" and it was agreed that said paper was "to be evidence on all points where it was not contradicted by other testimony, and was not itself to be evidence wherein contradicted." *Goldsmid v. The Lewis County Bank*, 497

12. *Held also*, that under the agreement made upon the trial, the account current was only to be regarded as *prima*

facts evidence as to all matters of account stated in it; that is, that the entries of advances and receipts of moneys stated therein were correctly charged; not that such account was to be deemed perfect, and as containing all the credits that should be allowed to the defendant. *ib*

*See ATTACHMENT.
NEW TRIAL.*

PRESUMPTION.

1. The ordinary presumption that a public officer has done his duty should never be allowed, to sustain a vital jurisdictional fact. But where the fact that on an application to a surrogate for an order to sell the real estate of a decedent, a guardian was appointed for the infant heirs, is made out independently, and without the aid of such presumption, the question being only as to the time when it was done, and the proof showing it might have been made in proper time, the law will presume that the appointment was made the requisite time before the parties in interest were, by the order, to show cause against the sale. *Sheldon v. Wright,* 39
2. When conveyances will not be presumed, although there has been a possession for more than thirty years. *Wilcox v. Randall,* 633

PRINCIPAL AND AGENT.

1. Giving to an agent unlimited power to sell an article, without restrictions, embraces the power to do what is ordinarily done upon such sales: to wit, to speak of the quality and condition of the article sold, and to contract with reference to its quality and condition. *Per Mason, J. Scott v. McGrath,* 53
2. The rule is very different, however, where the principal restricts the power of his special agent upon that subject. In such case the restrictions must be strictly pursued, or the employer will not be bound. *ib*
3. Accordingly, where the owner of a horse employed a person to sell the same, or to exchange him for another horse suitable for staging, and the agent exchanged the horse for a span

of ponies not suitable for staging, at the same time warranting the horse exchanged by him; it was held, in an action against the principal, upon the warranty, that he was not liable. *ib*

See GUARDIAN AND WARD, 2.

PRINCIPAL AND SURETY.

1. A judgment, rendered against a surety in a bond as well as the principal, for an amount exceeding the penalty, is erroneous. *Rayner v. Clark,* 581
2. The liability of a surety is limited in amount, by the penalty of his bond; and he can in no event become liable for a greater amount. *ib*

See CORPORATION, 7.

PRIVATE WAY.

1. The grantee of a *private* way, which has become *foundries* and *impassable*, can not, without being a trespasser, go on the adjoining close, and thus pass around the obstruction. *Williams v. Salford,* 309
2. The rule is the same, where the owner of the close through which the private way passes, caused the obstruction. *ib*
3. It seems that the only remedy for the owner of the way is to remove the obstruction and to prosecute for damages. *ib*
4. There is no distinction, with respect to the right of passing *extra terram*, between a *private* way by grant and a *private* way *ex necessitate*, after the latter has once been selected or assigned. *ib*
5. The same rule applies to a private way by *prescription*, that controls in the case of a grant. *ib*

PROMISSORY NOTES.

1. A note made by two persons, and signed by one of them as "surety" is inadmissible in evidence under the common counts, in an action brought against both makers. *Balcom v. Woodruff,* 13

2. A promissory note is only *prima facie* evidence of money lent, or had and received, by the party sought to be charged; and therefore where it is apparent from the face of the note, that no money was in fact received by such party, the note will not sustain the common counts. *ib*

3. The word "surety," appended to the name of one of the makers of a note, is not inconsistent with the idea that money was received by the other makers; but it does repel all presumption that the *surety* received it. And, therefore, as against him the note furnishes no evidence of money either lent to, or received by, the party, so as to support the common counts. *ib*

4. Where a note, not negotiable, is indorsed by the payees, generally, such indorsement does not amount to a *guaranty*, *it seems*. *White v. Law*, 204

5. In such a case the payees may be treated as *indorsers*; and where that can be done, *it seems* the holder has no option to proceed against them as *guarantors*. *ib*

6. In a suit upon a note thus indorsed, against the makers and indorsers, presentation of the note by the owner need not be averred. *ib*

7. An action will not lie upon such a note, by the indorsee, against the makers and indorsers jointly. *ib*

westerly of Hudson-street, provided the assent of the mayor and common council should be first obtained for such location. The railroad company having, with the assent of the corporation of New-York, located their railroad on and through certain streets of the city, within the district mentioned in the act, and obtained permission from the common council to lay down a double track of rails from West-street through Canal and Hudson streets to Chambers-street; *Held* that the court would not interfere by injunction to prevent the railroad company from laying down its rails in those streets, and using the same for the purposes of their railroad, upon the application of persons owning property bounded on such streets, alledging that the construction of the railroad through those streets was unauthorized by law, and a nuisance; that their property would be injured and depreciated in value, and their business seriously affected thereby; and that real estate and property vested in them by law had been taken for the location and construction of such railroad without previously making them compensation therefor. *Drake v. The Hudson River Railroad Co.* 508

2. For contingent and consequential damages of that nature, when they occur, the party aggrieved has a remedy by action at law, and by a repetition of such action from time to time during the continuance of the grievance, whenever and as often as loss or damage ensues. *ib*

3. And if the use of the railroad, in the streets of the city, becomes a nuisance, or the aggression proves to be permanent, and without an adequate remedy at law, then the supreme court will be competent to administer its equitable relief by injunction, to prevent its continuance, or for its removal. *Per Jones, P. J.* *ib*

4. But a strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction, as a precautionary and preventive remedy. *ib*

5. The prohibition of the constitution is against *taking* private property for public use, without making compensation; and not against *injuries* to such property, where it is not taken. *ib*

PURPRESTURE.

See RAILROADS, 8.

R

RAILROADS.

1. By an act of the legislature the Hudson River Railroad Company was authorized and empowered to construct a railway between the cities of New-York and Albany, commencing in the city of New-York, with the consent of the corporation of New-York; and the directors were authorized to locate such railroad on any of the streets or avenues of the city of New-York westerly of, and including, the Eighth avenue, and on or

westerly of Hudson-street, provided the assent of the mayor and common council should be first obtained for such location. The railroad company having, with the assent of the corporation of New-York, located their railroad on and through certain streets of the city, within the district mentioned in the act, and obtained permission from the common council to lay down a double track of rails from West-street through Canal and Hudson streets to Chambers-street; *Held* that the court would not interfere by injunction to prevent the railroad company from laying down its rails in those streets, and using the same for the purposes of their railroad, upon the application of persons owning property bounded on such streets, alledging that the construction of the railroad through those streets was unauthorized by law, and a nuisance; that their property would be injured and depreciated in value, and their business seriously affected thereby; and that real estate and property vested in them by law had been taken for the location and construction of such railroad without previously making them compensation therefor. *Drake v. The Hudson River Railroad Co.* 508

2. For contingent and consequential damages of that nature, when they occur, the party aggrieved has a remedy by action at law, and by a repetition of such action from time to time during the continuance of the grievance, whenever and as often as loss or damage ensues. *ib*

3. And if the use of the railroad, in the streets of the city, becomes a nuisance, or the aggression proves to be permanent, and without an adequate remedy at law, then the supreme court will be competent to administer its equitable relief by injunction, to prevent its continuance, or for its removal. *Per Jones, P. J.* *ib*

4. But a strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction, as a precautionary and preventive remedy. *ib*

5. The prohibition of the constitution is against *taking* private property for public use, without making compensation; and not against *injuries* to such property, where it is not taken. *ib*

6. Contingent future damages, or incidental and consequential injuries, of indefinite amount, not capable of estimate, do not come within the rule. *ib*
7. Therefore, where it is not alledged that private property has been taken by a railroad company, for the purposes of the road, but it is claimed that it is and will be injuriously affected by erections made, and proposed to be made and used, by the company, in its vicinity, the owners have no claim to have their damages ascertained and paid for before such erections shall be constructed and used. *ib*
8. A railroad is not, *per se*, a nuisance. Nor is the use of a street in a city, for a railroad track, in such a manner as not to abridge or obstruct the right of passage and repassage for other purposes, such an exclusive appropriation of the street as to amount to a nuisance, or a purpresture. *ib*
9. Nor will the construction of a railroad through the streets of a city amount to an infringement of private rights, though the track should cause a slight change in the surface of the streets; provided the passage is left free and unobstructed for the public. *ib*
10. The owners of property bounded upon streets in a city have rights in such streets, and an interest in the maintenance of them in their integrity; but such right and interest consist merely in the use, benefit, and enjoyment of them as public streets or highways for the legitimate uses and purposes of streets. They have no private or exclusive right to, or property in, the use or enjoyment of them. *Per Jones, P. J.* *ib*
11. All other citizens have an equal right, with such owners, to the use of the public streets as such. And a railroad company, as part of that public, have the same right, in common with others, to use the same, under the rules and regulations prescribed by the proper authority, for the purposes to which the lands forming the streets were dedicated to the public, or taken by the corporation for public purposes. *Per Jones, P. J.* *ib*
12. It seems that, for the purpose of managing and regulating the public streets in the city of New-York, and the use of them for the trusts and pur-

poses of their dedication or establishment; prescribing the width of the sidewalks and of the carriage way; licensing the partial and temporary use of parts of them for necessary private purposes; and permitting or prohibiting special uses for particular objects, &c. the legal title to the land or soil of the streets is vested in the city corporation, subject to the public use of them as public streets of the city. *Per Jones, P. J.* *ib*

13. And if the corporation of the city are the owners of the legal title to the soil of the streets, they are the only parties whose rights of property are violated, or whose ownership can be said to be usurped, by the construction of a railroad through such streets. And they are the only persons who can claim the right to have the rails removed, or the use of the street vindicated, or freed, from the alledged incumbrance, or the proceedings of the railroad company arrested until compensation shall be made. *Per Jones, P. J.* *ib*

RECEIPT.

See EXECUTORS, &c. 1, 2, 3.

RECEIVER.

1. When a plaintiff sues as receiver, he should at least state the place of his appointment, and distinctly aver that he has been appointed by an order of the court. *White v. Low,* 204
2. The defendant has a right to insist that the facts constituting the appointment of the plaintiff, as set out, shall be sufficient to show one has been made, and that those facts be so set out as to be triable. *ib*

REDEMPTION.

See JUDGMENT, 2, 12.

REFEREE.

1. It seems that the decisions of a referee upon matters of fact, in equity cases, should be treated as being not, like the verdict of a jury, conclusive unless palpable error is manifest, but like the report of a master, or the decision of a vice chancellor, upon any matter referred, under the former practice; where, upon exceptions, or ap-

peal, all questions decided were the subjects of review. *Per HARRIS, J.*
Burhans v. Van Zandt, 91

2. The credibility of a witness, on a hearing before a referee, is a question solely for the referee; and his decision can not be supervised. *Leach v. Kelsey,* 466

3. The fact that upon the hearing of a cause before a referee a party excepts to the decisions of the referee, and that those exceptions appear in the case made for the purpose of obtaining a new trial, does not make it a bill of exceptions. It is to be treated as a case, it seems. *Allen v. Way,* 585

4. And if from such case the court can see that improper evidence, admitted by the referee, although objected to, did not and could not possibly have injured the party objecting, a new trial will not be granted because of the admission of such evidence. *ib*

5. But if improper evidence is admitted by a referee, in a case where the facts are not clearly and indisputably established without it, a new trial will be granted, notwithstanding the referee states, in his report, that in considering the case and making his report thereon, he rejected such improper evidence. For in such a case the court can not say that the objectionable evidence could not possibly have influenced the referee. *ib*

6. A referee or court can not, while professing to admit evidence absolutely, admit it, in fact, *de bene esse*, and then reject it, upon making up a decision or report upon the whole case. Interlocutory decisions, made upon the trial, can not be reviewed in that manner. *ib*

7. The discretion as well as the authority of a referee, over the interlocutory questions presented in the progress of the trial, ceases with his decision of them, or at least with the trial itself. *ib*

REPLEVIN.

See CONSTABLE.
PLEADING, 7.

RIGHT OF WAY.

See PRIVATE WAY.

ROSSIE LEAD MINING COMPANY.

See CORPORATION.

S

SALVAGE.

See LIEN.

SATISFACTION.

See DEVISE.
MORTGAGE.

SLANDER.

1. In an action for slander, actionable words, not declared on, can not be given in evidence. *Randall v. Butler,* 260

2. To render a charge actionable it is not necessary it should be made in direct terms. It may be made in ambiguous language, or by innuendo. *ib*

3. In such a case it is only requisite to aver that the defendant, by means of the words, intimated, and meant to be understood by the hearers, as charging the plaintiff with the crime imputed; and whether such was the intention of the defendant, is a question of fact, to be determined by the jury. *ib*

4. Where the defendant, in speaking of an oath taken by the plaintiff, in a suit before a justice of the peace, and of the defendant's having made a complaint against the plaintiff before the grand jury for perjury, said "he went to the grand jury and asked them if they wanted any more witnesses, and that they said they had witnesses enough to satisfy them." *Held,* that the words, if laid with the proper averments, were actionable. *ib*

STATUTES.

1. In the revision of statutes, an alteration in the phraseology, or the omission or addition of words, does not necessarily alter the construction of the act, or imply an intention on the part of the legislature to alter the law. *Croswell v. Crane,* 191

2. In the revision of the laws, a reform of the language is not necessarily an alteration of the law. *ib*

3. The intent of the legislature to alter the law must be evident, or the law

guage of the new act must be such as palpably to require a different construction, before the courts will hold the law changed upon such revision, merely from the fact of a change of the language employed. *ib*

4. Where the title of a statute was, "an act to provide for the construction and alteration of the highway between the village of Herkimer and Middleville," and the first section appointed commissioners "to alter, reconstruct, and improve the public road leading from the village of Herkimer to the bank of" a creek within the village of H. "and thence along or near the bank of the said creek to the village of M." *Held* that the word *from*, in the act, must have a reasonable construction, in reference to the subject matter; and it appearing that unless it was adjudged to include some part of the village of H. the object of the grant could not be accomplished, nor the entire road be improved, it was also held that the word "from" must be taken inclusively, and not so construed as to prevent the commissioners from entering upon lands within the limits of the village of H. *Smith v. Helmer*, 416

5. *Held further*, that to affect the construction of the statute, and to show that the legislature intended to authorize the making and alteration of the road within the village of H., evidence that the particular road was the only road answering the description in the statute, was competent. *ib*

6. In a case of doubtful meaning, reference may be had to extrinsic circumstances, to ascertain the intent of the legislature, in the use of particular words. *ib*

7. Such evidence is proper, whenever words may have different meanings, under different circumstances. *ib*

8. A statute providing for the construction and alteration of a highway within the limits of an incorporated village and appointing commissioners for that purpose, but which does not profess to, and does not, impair or abridge, or enlarge the rights, duties, or powers of the trustees of the village, as commissioners of highways, will be considered as merely an excise, within the corporate limits of the village, of the right of *eminent domain*, with which the state has never parted. *ib*

9. Such a statute does not require a two thirds vote, to render it operative within the limits of the village, under the section of the constitution of 1821, requiring the assent of two thirds of the members of each house to every bill creating, altering, or renewing any body politic or corporate. *ib*

10. Laws affecting municipal corporations may be passed by mere majority votes. *ib*

11. The notice required by the statute, (1 R. S. 155, § 1,) to be given of an intended application to the legislature for an act authorizing the making or improving of a road, was calculated merely to guard the legislature from surprise and fraud, and to prevent hasty and improvident legislation. *ib*

12. The law requiring such notice to be given did not confer any new power upon the legislature, depending upon the publication of the notice. It is a rule made by the legislature for its own convenience, and may be entirely disregarded, without affecting the validity of the act. *ib*

13. But if a compliance with the requirement were necessary to the validity of the act, as affecting the regularity of its passage, and its validity could be questioned in a collateral manner, for the want of the proper notice, the publication of the notice required by law would be presumed. *Pcr ALLEN, J.* *ib*

14. It is a general rule that statutes shall be construed to act prospectively, and not retrospectively. The meaning of the rule is that a statute is not to be construed to operate retrospectively, so as to take away a *vested right*. *Wadsworth v. Thomas*, 445

15. Under the 12th section of the act of May 2d, 1834, "to provide for supplying the city of New-York with pure and wholesome water," which authorizes the water commissioners to enter upon land and agree with the owner of any property which may be required, as to the amount of compensation to be paid to him, and which provides that in case of disagreement the vice chancellor may, upon the application of either party, appoint three persons to appraise the value of the property, or the amount of damages, it is not necessary that there should

be a formal offer of compensation upon the one side, and a refusal upon the other, before an application can be made for the appointment of appraisers. *Dyckman v. The Mayor, &c. of New York,* 498

16. All that a reasonable construction of the act requires is, that the parties should have failed to come to an amicable arrangement; or, in other words, that there should be a difference of opinion as to the compensation which one party would be willing to give, and the other party to receive. *ib*

17. What is a sufficient notice of the application for the appointment of appraisers. *ib*

18. An appearance of the owner, by his counsel, before the vice chancellor, to oppose the confirmation of the report of the appraisers, without raising the objection of a want of notice of the application for the appointment of appraisers, or of an insufficient notice, will be considered a waiver of the objection. *ib*

19. Where property required by the water commissioners is owned by several persons as tenants in common, it is not necessary there should be a separate appraisement of the value of the undivided interest of each of the co-tenants. It is sufficient in such a case, to appraise the value of the whole property together. *ib*

20. A tender of the compensation ascertained by the appraisers, to one of several owners of the land taken, who has acted in behalf of the others throughout the proceedings, and who has been authorized by his co-tenants to refuse it, or whose acts are subsequently ratified by them, is a valid tender to all the owners. *ib*

See CODE.

CONSTITUTIONAL LAW.

HIGHWAYS, 1.

JUSTICES OF THE PEACE, 3, 4.

STREETS.

Although the acts of 1798 and 1813, giving to the city of New-York the right to lay out and complete a street or wharf of the width of 70 feet, in front of those parts of the city adjoining the East river, give no right, in express terms, to fill up a slip beyond the then existing boundary of

the city, yet the city has a general right to fill up slips; and is not guilty of an illegal assumption of power, if the result of the exercise of such a right is the making of a street of the width authorized by statute. *The Mayor, &c. of N. York v. Whitney,* 455

See ASSESSMENT, &c. 14.

SURROGATE.

1. Under the section of the act of April 18, 1813, relative to the court of probates, &c. providing that no administration shall in any case be granted until satisfactory proof shall be made, before the surrogate, that the decedent is dead, and died intestate, it is not sufficient for the applicant for letters of administration to set forth the facts in a petition, and swear that the matters therein stated are true, *to the best of his knowledge and belief*; without alleging any knowledge, or means of knowledge, or reasons for his belief. *Sheldon v. Wright,* 39

2. But the objection is not available as against the jurisdiction of the surrogate, so as to render the grant of administration void. The evidence is at least colorable; and although objectionable as legal evidence, its reception is merely error, and can only be objected to, on appeal. *ib*

3. Neither will the objection that no citation to the next of kin of the intestate was issued by the surrogate, go to the question of jurisdiction. *ib*

4. Under the 23d and 31st sections of the statute, upon an application to the surrogate for an order to sell the real estate of the decedent for the payment of debts, guardians for the infant heirs must be appointed, at least six weeks previous to the day for showing cause. *ib*

5. In order to give the surrogate jurisdiction of the persons of the heirs, upon such an application, the provisions of the statute, requiring the order to show cause to be published for four weeks successively in two or more newspapers, must be strictly complied with. *ib*

6. And the fact that the publication required by the statute was duly made, is one which a party claiming title under a sale made in pursuance of the order of the surrogate is bound affirmatively to establish. *ib*

7. The direction of the statute, that the order to show cause shall be "immediately" published, is to be understood as only requiring the publication to be four successive weeks before the day for showing cause; and that the order shall be published as soon as conveniently may be. *ib*

8. The act does not require the first of the four successive publications to be four weeks before the day for showing cause. The requirement is satisfied by four successive weekly publications previous to the day. *ib*

9. What is a sufficient compliance with the provisions of the statute requiring an account of the personal estate, and debts, of the decedent, to be presented to the surrogate, signed and verified by the administrator. *ib*

10. Where, after a surrogate has made an order for the sale of all the real estate of the decedent, describing it by metes and bounds, but before any action has been had, under such order, the administrator discovers that the boundaries mentioned in the order do not comprise the whole of the real estate, the surrogate may, upon the petition of the administrator, vacate such order of sale, and make a new order for the sale of all the real estate of the decedent, as well that embraced in the former order, as the portion not included therein. *ib*

11. The omission of the administrator to verify his report of sale, does not affect the jurisdiction of the surrogate; that being a mere matter of practice. *ib*

12. Under the third subdivision of the first section of the title of the revised statutes respecting surrogates' courts, a surrogate has plenary power to control the conduct of executors and administrators. *Bliss v. Sheldon*, 152

13. The words of the subdivision are directly applicable to a case in which an executor persists in exercising the functions and discharging the duties of his trust erroneously, or irregularly. And any person who suffers an injury by the erroneous action of an executor, in his proceedings in the surrogate's office, may lawfully call upon the surrogate to control his conduct. *Per GRIDLEY, J.* *ib*

14. If executors have filed an inventory of the personal estate of their testator, without setting off any part of the property to the widow, as exempt ar-

titles under the provisions of the revised statutes or of the act of 1842, and have converted into money all the articles contained in the inventory, the surrogate has the power to order them to pay to the widow a sum of money, in lieu of what she was entitled to receive under the exemption laws. *ib*

15. The surrogate has the power to decide upon, and direct, the allowance of any sum within the limit (of \$150) prescribed by the statute. And where it does not appear that he has exceeded his jurisdictional power, the exercise of his judicial discretion will not be revised, on appeal. *ib*

16. Where a surrogate's return upon appeal, assumes to state what the facts are in regard to a claim against the estate of a decedent, without stating what the evidence of those facts was, the court will presume that such facts were legally ascertained by the surrogate, upon sufficient evidence. *Kirby v. Carpenter*, 373

17. If the fact is otherwise, the respondent may compel a further return from the surrogate, showing whether any and what evidence was given in support of the claim. *ib*

18. On the distribution of the moneys arising from the sale of the real and personal estate of a decedent, debts owing by him as a member of a co-partnership, should not be placed by the surrogate on a par, or in the same class, with debts owing by the decedent individually; but should be postponed till the individual debts are paid. *ib*

19. And where the surviving partners, after the death of the deceased, pay debts owing by the partnership, their relation to the separate estate of the decedent is not thereby changed. They stand in the place of, and represent, the creditors whose debts they have paid; who can only come in for a share of the assets of the estate, after the individual debts shall have been paid. *ib*

20. On the same principle, the claims of individual creditors are entitled to priority over those of the surviving members of the firm, growing out of the partnership transactions. *ib*

21. Where an application is made to a surrogate, for the appointment of a guardian for an infant under fourteen

years of age, he should assign a day for the hearing of the application, and direct such notice to be given to the relatives of the infant, residing in the county, as he shall, on due inquiry, think reasonable. *White v. Pomeroy*, 640

22. And although the act of 1837 requires notice to be served only on such relatives as the surrogate shall direct, this does not dispense with the duty of making the inquiry as to the relatives of the infant, and of directing notice to be given in proper cases. *ib*

23. The discretion vested in the surrogate, is not an arbitrary one; and if it has been erroneously exercised, the error will be corrected on appeal. *ib*

24. Where the appointment of a person as guardian is invalid, his subsequent appointment as administrator of his ward's father, will also be erroneous, if his claim to be appointed administrator rests upon the fact that he has been appointed guardian, and is entitled to administer in the right of his ward; and letters have been issued to him, without any citation or notice to relatives having a prior right to the administration. *ib*

See EXECUTORS AND ADMINISTRATORS. WITNESS, 1, 2.

T

TAVERN-KEEPERS.

See JUSTICES OF THE PEACE, 3, 4.

TAXES AND TAXATION.

1. After a tax has been regularly assessed upon lands situated in a town other than that in which the owner resides, if the owner neglects or refuses to pay the tax, the collector of the town in which the lands lie will be justified in levying and collecting such tax of the goods and chattels of the owner. *Van Rensselaer v. Cottrell*, 127

2. The act of May 13, 1846, to equalize taxation, is not void as being an *ex post facto* law; it not being designed to operate retrospectively. *Le Couerul v. Supervisors of Erie Co.* 249

3. A lease for a term of thirty years, executed before that act took effect, is within the purview of the act, and the rents therein reserved are liable to

taxation, although at the passage of the act the lease had less than twenty-one years to run. *ib*

See ASSESSMENT AND ASSESSORS.

TENANT FOR LIFE.

1. A tenant for life, although bound to keep down the interest upon the incumbrances, out of the rents and profits, is not bound to extinguish the incumbrances themselves. *Burkens v. Van Zandt*, 91

TENDER.

2. Where a *tender* is made, after the creditor has employed an attorney to bring a suit, who has filed a declaration, and mailed a copy to the sheriff, to be served, but before the same is served, it is sufficient for the debtor to tender the amount of the debt, without offering to pay the plaintiff's costs; especially if the debtor, at the time of making the tender, does not know, and is not informed by the creditor, that costs have been incurred. *Marvin, J. dissented. Hull v. Peters*, 331

See STATUTES, 20.

TOLLS.

See PLANK ROADS, 13.

TRUSTS.

It is now well settled, especially in regard to trusts of personal property, that where personal estate is vested in trustees upon various trusts, some of which are valid and others void, the courts must separate those which are legal and valid, if they can be separated, from those which are illegal and void. *Vail v. Vail*, 236

See WILL, 4.

U

USE AND OCCUPATION.

1. A landlord can only recover, in an action for use and occupation, for the time the tenant has *actually occupied* the premises, either by himself or by his sub-tenant or agent. *Cronell v. Crane*, 191

2. When the tenant has not entered into possession at all, *under the lease or agreement*, either in person or by an under tenant or agent, no recovery can be had. *ib*

3. An action for use and occupation is founded on contract, express or implied, and lies only when the relation of landlord and tenant exists. *ib*

4. If the circumstances of the case are inconsistent with the existence of a contract, and necessarily rebut every implication of a promise to pay rent, that form of action will not lie. *ib*

5. In an action by a purchaser, against the vendor, for fraud, in misrepresenting the boundaries of the land, a notice previously served by the purchaser upon a claimant of a portion of the land, under the statute concerning proceedings to compel the determination of claims to land, (2 R. S. 312.) will be evidence against the plaintiff, to show what land he then claimed a right to hold, under his conveyance. *ib*

V

VARIANCE.

1. Under an averment in an answer, that the property was "very poor, and of very little value," the defendant can not prove that it was "worth nothing and of no value." *Deisen-dorf v. Gage*, 18

2. A defendant will not be allowed to give evidence of a defense not set up in his answer. *ib*

VENDOR AND PURCHASER.

1. Where property is sold at a stipulated price, without any fraud or warranty on the part of the vendor, and after an examination of it by the purchaser, with all the means of knowing its condition and quality which the vendor possesses, the fact that the property is good for nothing, and that no use can be made of it, forms no defense to an action for the price. *Deisen-dorf v. Gage*, 18

2. In the absence of any proof as to the value of an article at the place where it was agreed to be delivered, evidence of its value at a different place, in the immediate neighborhood, is admissible. *ib*

3. An action can not be maintained by a purchaser, against the vendor, to recover damages for fraud upon a sale of land, in making a false representation as to one of the boundaries, if, at the time of the purchase, the plaintiff had the means of ascertaining the true line, and neglected to inform himself. *Clarks v. Baird*, 64

6. An executory contract for the sale and purchase of land, giving to the purchaser a right to enter and possess the premises until default in the payment of the purchase money, without any time being fixed, and without any reservation of rent, is as respects the possession, but a *license* and not a *lease*. *ib*

7. It is not a permanent interest in the land; nor is it an estate; nor does the relation of landlord and tenant exist. *ib*

8. Such license operates as an excuse for the vendee's possession, and he can not be treated as a wrongdoer, until default; at least not without a demand of possession. *ib*

9. Under an executory contract of sale, authorizing the purchaser to enter into possession, and reserving to the vendor the right to re-enter on the non-payment of either installment of the purchase money, the vendor, upon a default, may re-enter and thereby revoke or countermand the license. *ib*

See AGREEMENT, 12 to 15.

VERDICT.

In general, after a jury has passed upon conflicting evidence, the court will not interfere with their verdict, on the ground of its being against the weight of evidence. *Fleming v. Hollenback*, 271

VESSEL.

1. A mortgagee of a vessel, not in possession, is not liable for repairs

done upon the vessel. *Hasket v. Stevens*, 488

2. The holding of a bill of sale, or having the mere legal title to a vessel, does not of itself render a party liable for repairs. *ib*

3. The credit is supposed to be given to the party in possession acting as owner. And as long as he remains in possession, with the consent of the party holding the legal title, and manages and controls the vessel, and receives the profits, he is, for all practical purposes, the owner; especially when he is so treated by the persons doing work upon the vessel. *ib*

W

WARRANT.

1. It seems that the warrant attached to an assessment roll, if regular and legal on its face, is a perfect protection to the collector acting under it; and that he is not bound to look beyond it. *Per Harris, J. Van Rensselaer v. Cottrell*, 127

2. A warrant, as against the person named therein, if fair upon its face, and showing jurisdiction in the person issuing it, will protect the officer acting under it. *Decker v. Bryant*, 183

3. But when it is sought to use the process as against third persons, as to attack the *bona fides* of a transfer of property, and it is insisted that the sale is fraudulent as against creditors, the preliminary proceedings necessary to establish jurisdiction must be shown. *ib*

See ASSESSMENT, &c. 4.

WARRANTY.

See PRINCIPAL AND AGENT.

WATER PRIVILEGE.

*See DEED, 5 to 9.
JURISDICTION, 3, 4.*

WILL.

1. Whether a devise of lands, in a will executed previous to the revised stat-

utes, contains no words of inheritance, only a life estate passes to the devisee. *Vanderwerker v. Vanderwerker*, 220

2. The introductory clause of a will evincing the intent of the testator to dispose of all his worldly estate, will not have the effect to enlarge the estate devised; unless the words of disposition in the clause of devise, are connected, in terms or sense, with the introductory clause, and import more than a mere description of the property. *ib*

3. A charge, in order to carry a fee, by implication, when the devise is without words of limitation, must be upon the person of the devisee, in respect to the lands devised. *ib*

4. A testator died, leaving a widow, and six children, some of whom were infants. By his will, executed since the revised statutes took effect, the testator, after giving various pecuniary legacies, directed his executors to invest \$25,000 of his personal estate for the use of his wife, during her life or widowhood, with liberty to her, if she died his widow, to dispose of the same by will, among his children or grandchildren; and if she died without making such disposition, then that the principal should sink into the general residue of the estate. He also directed \$10,000 to be invested for the use of his daughter Mrs. T. for life, with remainder to her two children, or the survivor of them; and if they should both die in the lifetime of their mother, then to such persons as she might by will appoint, or in default of such appointment, that the principal sum should sink into the general residue. The executors were also directed, from the income of his estate, to provide for the support and education of his minor children, until they should respectively arrive at the age of 21 or be married. The testator also gave to each of his five daughters a legacy of \$25,000; those to the married daughters to be paid immediately, and those to the others at the age of 21 or sooner, if they should marry with the consent of the executors. He also gave to each daughter a legacy of \$25,000 payable at the age of 25 years. These several legacies were to be paid to the issue of such of the daughters as should die before the same became payable, provided they had any issue living at the time when such payment was to be made; other-

wise the legacy was to fall into the general residue. The testator also gave to his son three legacies of \$25,000 each, payable at the ages of 21, 26 and 27. The executors were directed to invest the whole of the personal estate of the testator, except so much as might be necessary to fulfil the requisitions of the will, in their own names for the use and benefit of the testator's children, in the purchase of real estate, or in bonds and mortgages, &c. And when the youngest child should arrive at the age of 25, or as soon thereafter as the widow should die, the executors were directed to sell all the real estate, and then to divide all that remained of the estate among the six children and their issue, in such proportions as to equalize, with interest, the previous advances made by the executors; so as to give to each child an equal benefit from the estate. But this distribution was to be made without reference to the legacy of \$10,000 to Mrs. T. and her children, or to any disposition which the widow might make of the \$25,000 legacy to her. The testator further directed that the several shares so apportioned should be invested in the name of the executors, as trustees for his children respectively, and that the income should be paid to the children for life. And that the portion of each child, after his or her death, should go to his or her issue, if any, and if none, then to be divided among the surviving children, and the issue of such as had died, *per stirpes*; or in such other manner as the child dying without issue might direct. *Held*, 1. That although there was no express devise to the executors, yet that a trust was vested in them by implication, for the purposes of the will; a trust being necessary in respect to the real estate, to enable the executors to receive and expend the rents and profits, and as to the personal estate, it being necessary to effectuate the intention to accumulate. And that during the continuance of such trust, the legal estate held by them was inalienable, either by the trustees or by the *testators* *que trust*; at least until the youngest child should attain the age of twenty-one years. 2. That as such trust would not terminate until the expiration of four minorities, the limitation was too remote, as suspending the ownership beyond the termination of two lives in being, and therefore void. 3. That it being manifestly the intention of

the testator to have all his estate converted into personal property, before its final distribution among his children, upon the principles of equitable conversion the whole estate was to be regarded as personal property. 4. That although the statute in regard to uses and trust does not apply to personal property, yet, that the statute respecting future estates in lands is applicable; and that under that statute the express trust commencing on the final division of the property among the testator's children was void. 5. That the ultimate disposition of the estate of the testator, in the will, was void; and that as to the residuum, the testator died intestate. *Vail v. Vail*, 226

5. A testator, by his will, which took effect in 1836, after sundry bequests to his wife, children, and others, devised as follows: "I give and bequeath all the rest and residue of my estate, after payment of my debts, funeral charges and legacies above mentioned, unto my said children, (naming them,) their heirs and assigns for ever, equally to be divided between them, share and share alike, and to the descendants of such of my children as shall have died, in equal portions, that is, such descendants to take the same to which their ancestor would have been entitled if living; but no division to be made until ten years after the death of my said wife." By an agreement made between the plaintiff C., and his wife M. A. C., (his intestate,) who was a daughter of the testator, and the executors on the 4th of May, 1840, C. and his wife in consideration of \$7000, a part of the residue of said estate then advanced to them by the executors, sold and transferred to the executors all their share in the residuary portion of the estate belonging to them or either of them, under the will of the testator or otherwise, to have and to hold till a final division of the estate should be made, when the sum then paid, with interest, was to be deducted from their share. And they covenanted that they would not, during the life of the widow, claim, demand, or sue for their share of the estate, nor do any act to impair the will of the testator. In a suit by C., as administrator of his deceased wife, against the executors, heirs at law, and next of kin of the testator, for an account by the executors, and to recover his wife's share of the residuary estate; *Held*, 1. That by the will, the children of

the testator, living at his death, and the descendants of those who had then died, took a vested interest in the residuary estate, at the death of the testator. 2. That the devise both of the real and personal estate was valid, as vesting a present interest in the beneficiaries. 3. That the condition annexed to the devise, that no division should be made until ten years after the death of the widow, was void, as to the personal estate, as suspending the absolute ownership thereof for a period beyond the time prescribed by the statute. 4. That the covenant or agreement of May 4th, 1840, was void. 5. That C., the plaintiff, was entitled to an account from the executors, in respect to the rents and profits of the real estate, from the death of the testator, during the life of his intestate, and a full account in relation to the personal estate. *Converse v. Kellogg*, 590

WITNESS.

- Upon the final settlement of the accounts of executors, before the surrogate, legatees who have appeared by their counsel before the surrogate, and are contesting the executors' accounts, are not competent witnesses; although upon being offered as witnesses they have assigned their claims upon the estate. *Mesick v. Mesick*, 120
- But a legatee who has been paid the full amount of his legacy, and has executed to the executors a receipt in full, is a competent witness. *ib*
- The assignor of a chose in action, which is assigned for the purpose of making him a witness, is not rendered incompetent to testify, by the provisions of the 352d section of the code of 1848, if he is not interested in the event of the suit. *The Hamilton and Deansville Plank Road Co. v. Rice*, 157
- The rule is still the same as it previously stood at common law, viz. that in a suit by a corporation an owner of stock in the corporation may, by assignment, divest himself of all interest in the event of the suit, and thus become a competent witness. *ib*
- Where T., the holder of a note made by G., assigned the same to E., and received as a consideration for the transfer, a note made by E., of the same date and amount and payable at the same time, without any understanding that his right to enforce the payment of E.'s note should depend on a recovery upon the note so assigned; *Held* that this amounted to an exchange of notes; that E. became the beneficial as well as the nominal owner of the note assigned to him by T.; and that in an action brought thereon by E., T. was not the "person for whose immediate benefit the suit was prosecuted," within the meaning of the 352d section of the code of 1848; so as to exclude him from being a witness. *Evarts v. Palmer*, 178
- If a person has no interest in the event of the suit, the fact that he had assigned to the plaintiff the note on which the suit is brought, even though such assignment was made for the purpose of making himself a witness, does not affect his competency. *ib*
- Where a witness is objected to as incompetent, if the objection is on the ground of interest, that must be stated as the ground of objection, and the nature of the interest must be specified; so that the party may, if in his power, remove it. *Leach v. Kelsey*, 466
- Where an objection to the competency of a witness is not taken on the hearing before a referee, it will be considered as waived. *ib*
- A more stringent rule does not prevail, under the code, in respect to the admissibility of parties as witnesses against their co-defendants, than existed under the former practice. *ib*

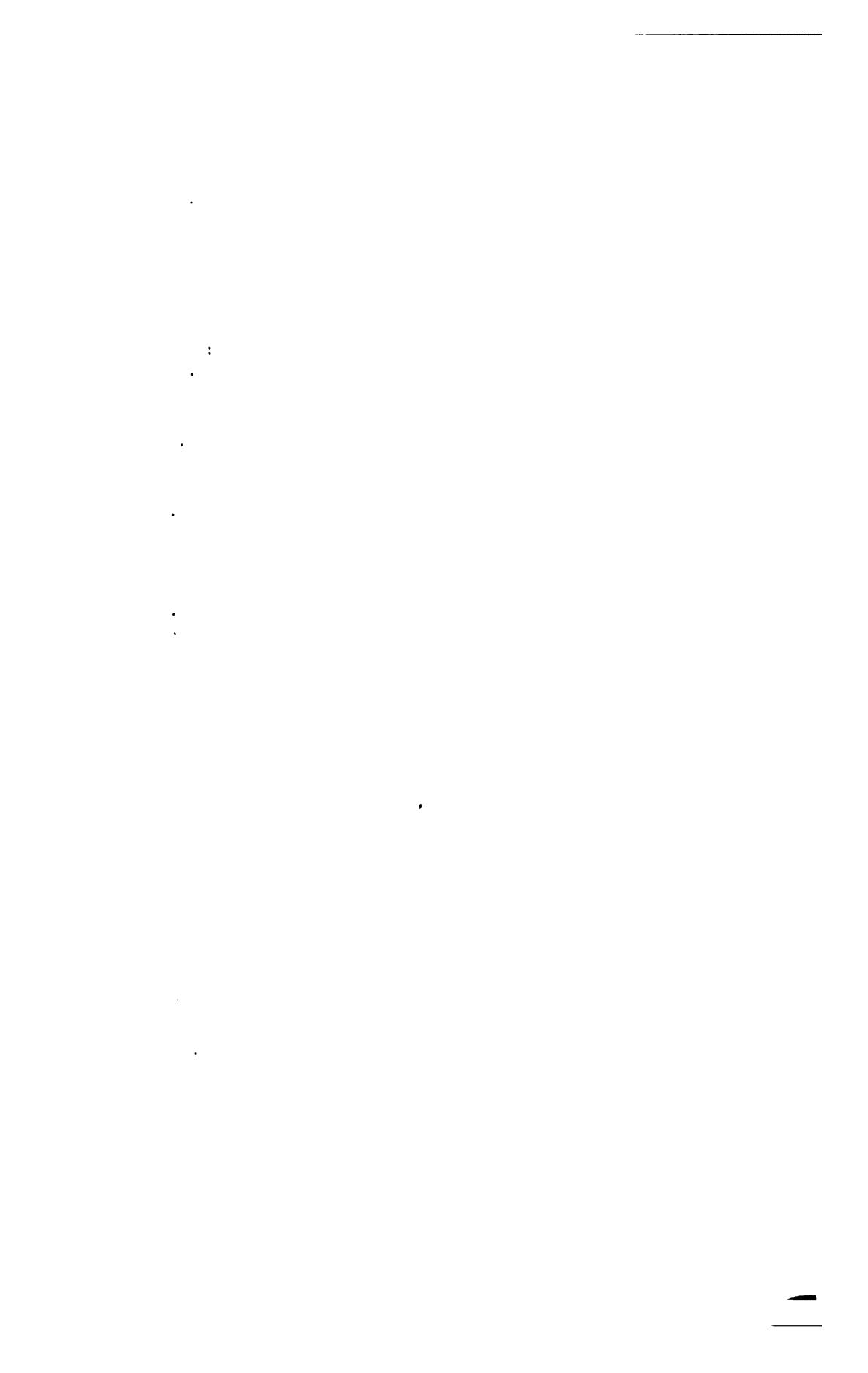
See OPINIONS OF WITNESSES.

WRECKS.

- The statute relating to wrecks has no application to the case of property found sunk in the channel of a navigable river. *Baker v. Hoag*, 113
- The provisions of the statute relate exclusively to such property as at common law is known as wrecks, and to the charges upon such property known as salvage, and the expenses incurred by virtue of the statute. What was *wrecked property*, at common law, is wrecked property under the statute. *ib*

END OF VOLUME SEVEN.

7540 46





~~RECEIVED~~
HARVARD LAW LIBRARY